

Cite as Det. No. 14-0350, 34 WTD 474 (2015)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of) D E T E R M I N A T I O N
Assessment of) No. 14-0350
)
)
...) Registration No. . . .
)

[1] RULE 217; RCW 82.32.145: RETAIL SALES TAX – TRUST FUND ACCOUNTABILITY ASSESSMENT (TFAA) – RESPONSIBLE INDIVIDUAL – CHIEF EXECUTIVE OFFICER – CHIEF FINANCIAL OFFICER – PRESIDENT – TREASURER. A person who acted as president and treasurer of a corporation during the period when unpaid trust fund taxes accrued is a responsible person, personally liable for the unpaid trust fund taxes, regardless of fault or whether the person was or should have been aware of the unpaid trust fund taxes.

[2] RULE 217; RCW 82.32.145: RETAIL SALES TAX – TRUST FUND ACCOUNTABILITY ASSESSMENT (TFAA) – RESPONSIBLE MEANS OF COLLECTION. The Department can collect against a responsible person even when the Department could potentially collect against a successor. A responsible person cannot shield himself from TFAA liability simply by identifying another potentially liable party.

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.

Weaver, A.L.J. – Taxpayer, the sole corporate officer of a defunct corporation, appeals a trust fund accountability assessment (TFAA). Because we find that Taxpayer was the chief executive and chief financial officer during the time the trust fund liability accrued, the TFAA is sustained and Taxpayer’s petition is denied.¹

ISSUES

1. Whether, under RCW 82.32.145, the sole corporate officer of a defunct corporation is liable for a TFAA.

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

2. Whether, under WAC 458-20-217, the Department can collect a TFAA from a responsible individual when the corporation's assets were sold to another corporation.

FINDINGS OF FACT

[Corporation] purchased a restaurant called [Restaurant] in March, 2010. Corporation was owned by [Taxpayer]. Taxpayer was listed as the President, Secretary, Treasurer, and Director of the Corporation on the Corporation's Master Business Application, filed with the Business Licensing Service of the Department of Revenue (Department), on April 15, 2010. Taxpayer was listed as President, Vice-President, Secretary, and Treasurer of the Corporation on the Corporation's Initial Annual Report filed with the Washington Secretary of State's Office on November 5, 2010. The Corporation operated the Restaurant until December 22, 2010.

Taxpayer electronically filed the Combined Excise Tax Returns with the Department on behalf of the Corporation. Taxpayer filed the Corporation's July 2010 Combined Excise Tax Return on October 11, 2010, reporting a balance due of \$. . ., including \$. . . in taxes and \$. . . in penalties due. On October 12, 2010, Taxpayer paid \$. . . toward this balance. Taxpayer filed the Corporation's August 2010 Combined Excise Tax Return, on November 15, 2010, reporting a balance due of \$. . . including \$. . . in taxes and \$. . . in penalties due. On November 16, 2010, Taxpayer paid \$. . . toward this balance. Taxpayer filed the Corporation's September 2010 Combined Excise Tax Return, on November 16, 2010, reporting a balance due of \$. . ., including \$. . . in taxes and \$. . . in penalties due. On November 17, 2010, Taxpayer paid \$. . . toward this balance. Taxpayer filed the Corporation's October 2010 Combined Excise Tax Return, on December 16, 2010, reporting a balance due of \$. . ., including \$. . . in taxes and \$. . . in penalties due. On December 17, 2010, Taxpayer paid \$. . . toward this balance. Taxpayer filed the November 2010 Corporation's Combined Excise Tax Return, on December 23, 2010, reporting \$. . . in taxes due. Taxpayer did not make a payment toward this balance. Taxpayer filed the Corporation's December 2010 Combined Excise Tax Return, on January 4, 2011, reporting \$. . . in taxes due. Taxpayer did not make a payment toward this balance.

On December 22, 2010, the Corporation sold the Restaurant's furniture, fixtures, equipment, leasehold improvements, office supplies, small wares, uniforms, and marketing aids and material to [Buyer]. The contracted purchase price of these listed assets was approximately \$. . ., which constituted an enumerated total of the Restaurant's past due bills, including approximately \$. . . in past due state sales taxes. The Buyer also contracted to pay the Corporation an additional \$. . ., in the form of a credit card payment, over and above the approximately \$. . . contract price (calculated by the amounts due on the Corporation's past due bills). *See Equipment Purchase Agreement, ¶ 3.1.* The Contract between the Corporation and Buyer did not contain any representation that Buyer would pay the Corporation's unpaid excise tax obligations. *See Equipment Purchase Agreement, ¶ 5.1-5.4.*

When the Corporation ceased doing business, it left behind unpaid excise tax taxes for July through December 2010. That liability included collected but unremitted state and local sales taxes. On November 1, 2010, Taxpayer stated to a Revenue Agent with the Department's Compliance Division that Taxpayer used the collected sales tax money to pay the Corporation's other bills. As a result of these unpaid taxes, on February 8, 2011, the Department's Compliance

Division issued Tax Warrant # . . . against the Corporation. The warrant was filed with the Clerk of the . . . County Superior Court on February 8, 2011.

The balance for Tax Warrant # . . . remains unpaid. The Compliance Division has failed to collect the unpaid sales taxes from the Corporation. According to the Washington Secretary of State's Office, the Corporation became inactive on August 1, 2011. In the Compliance Division's agent's notes, on October 13, 2011, Taxpayer told the Compliance Division that the Corporation purchased the business in early 2010 and started the business in March 2010. The Compliance Division's notes show that taxpayer also stated that he was the Corporation's sole corporate officer and that he was the only person with the authority to make decisions on behalf of the Corporation.

On October 29, 2013, the Compliance Division issued a trust fund accountability assessment (TFAA) against Taxpayer for the Corporation's unpaid taxes for The face amount of the TFAA was \$. . . , which included \$. . . in taxes due, \$. . . in delinquent penalties, accrued interest of \$. . . , and \$. . . in other penalties. Taxpayer filed a timely appeal.

ANALYSIS

Businesses that make retail sales are required under RCW 82.08.050 to collect retail sales tax from their customers, hold it in trust until paid to the Department and report and remit the collected tax to the Department. Sellers who fail to collect retail sales tax or fail to remit collected retail sales tax to the Department are personally liable to the state for the amount of the tax. RCW 82.08.050(3). When a limited liability business entity, like a corporation, is dissolved or otherwise terminated owing collected but unremitted retail sales tax to the state, the Department may pursue collection of the entity's unpaid trust fund taxes, including penalties and interest on those taxes, against "responsible individuals." RCW 82.32.145(1); WAC 458-20-217(8). There is no dispute in this case that the Corporation was dissolved owing collected but unremitted retail sales tax to the state.

RCW 82.32.145 defines "responsible individual" as "any current or former officer, manager, member, partner, or trustee of a limited liability business entity, with an unpaid tax warrant issued by the department." RCW 82.32.145(9)(g)(i). RCW 82.32.145 imposes personal liability for unpaid trust fund taxes on those specified individuals, in relevant part, as follows:

For a responsible individual who is the current or 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.

RCW 82.32.145(3)(a). A responsible individual who is a chief executive or chief financial officer is only liable for trust fund tax liability accrued during the period he or she was acting in those roles. RCW 82.32.145(4)(a).

The term "chief executive" is defined by statute, as "[t]he president of a corporation." RCW 82.32.145(9)(a). The term "chief financial officer" is defined by statute as "[t]he treasurer of a

corporation.” RCW 82.32.145(9)(b). There is no dispute in this case that Taxpayer acted as the president and the treasurer of the Corporation during the time that the Corporation’s unpaid trust fund taxes accrued. Because there is no dispute that Taxpayer was the “chief executive” and “chief financial officer” of the Corporation, Taxpayer is liable for the unpaid trust fund tax liabilities at issue in this case.

Even if Taxpayer was not liable as a “responsible individual” under RCW 82.32.145(3)(a), as the “chief executive” and “chief financial officer” of the Corporation when the tax liability accrued, he could otherwise be held liable for the unpaid trust fund taxes, if he had the responsibility to remit payment of the trust fund taxes and willfully failed to do so. *See* RCW 82.32.145(3)(b), (4)(b). In this case, Taxpayer was the person who electronically filed the Corporation’s Combined Excise Tax Returns without paying the amounts due. Taxpayer stated to the Compliance Division that he was the only person with the authority to make decisions on behalf of the Corporation and that he chose to pay other corporate debts with the trust fund taxes the Corporation collected and failed to remit. For these reasons, we further hold that Taxpayer is a “responsible individual” because he had the responsibility and duty to remit payment to the department and willfully failed to pay the trust fund taxes to the Department. RCW 82.32.145(3)(b), (4)(b).

Taxpayer takes the position that he cannot be held liable for the unpaid trust fund taxes because he sold the assets of the Corporation to the Buyer in exchange for the Buyer’s promise to pay the Corporation’s unpaid sales tax obligations. As an initial matter, we disagree with Taxpayer’s factual allegation that the Buyer agreed to pay the Corporation’s unpaid sales tax obligations. The terms of the contract between the Corporation and the Buyer state that the purchase price would be determined by totaling the Corporation’s past due bills,² including its past due state sales taxes. We find that, while the purchase price may have included the unpaid state sales taxes, the terms of the contract did not actually require the Buyer to remit the unpaid state sales taxes directly to the Department. Instead, the purchase price was set at an amount that would enable the Corporation to pay its outstanding bills and the Corporation failed to remit the sales tax portion of the purchase price to the Department. These findings are supported by the fact that the Corporation’s trust fund tax liability remains unpaid.

However, even if the contract between the Corporation and the Buyer did require the Buyer to pay the Corporation’s unpaid state sales taxes, the State of Washington was not a party to that contract and cannot be bound by its terms. *See* Det. No. 94-090, 14 WTD 244 (1995) (“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 [and] is not bound by that agreement.”). Taxpayer cannot shield himself from liability by citing the provisions of a contract to which the Department was not a party.

Despite the fact that the Department was not a party to the contract, Taxpayer still cites its terms as support for his argument that the Department cannot collect the TFAA from him personally,

² The terms of the contract also contemplate the Buyer paying the Corporation \$. . . above and beyond the total of the Corporation’s enumerated past due bills, in the form of a credit card payment. *See* Equipment Purchase Agreement, ¶ 3.1.2.

because the Department could, instead, collect against the Buyer as a successor. WAC 458-20-217 (Rule 217) lists the following requirements for a responsible person's TFAA liability:

- (b) **Requirements for liability.** In order for a responsible person to be held personally liable for collected and unpaid sales tax:
- (i) The tax must be the liability of a corporate or limited liability business;
 - (ii) The corporation 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.

Rule 217(8)(b). Rule 217 defines the term "no reasonable means of collection" as follows:

The department has "no reasonable means of collection" if the costs of collection would be more than the amount that could be collected; if the amount that might be recovered through a levy, foreclosure or other collection action would be negligible; or if the only means of collection is against a successor corporation.

Rule 217(8)(f) (emphasis added).

Rule 217 specifically states that the Department can collect against a responsible person even in the event that Department could potentially collect against a successor. Rule 217(8)(f). Liability under a TFAA is joint and several. Det. No. 00-143, 20 WTD 170 (2001). The Department may collect the entire amount of the TFAA against any responsible individuals. *Id.* Taxpayer cannot shield himself from TFAA liability simply by identifying another potentially liable party. Under the plain language of Rule 217, the Department's ability to potentially collect against a successor corporation does not shield a responsible person from TFAA liability. Taxpayer is therefore liable for the TFAA.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 7th day of November, 2014.