

Cite as Det No. 08-0203, 28 WTD 29 (2009)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For)	<u>D E T E R M I N A T I O N</u>
Correction of Assessment of)	
)	No. 08-0203
)	
...)	Registration No. . . .
)	Document No. . . .
)	Docket No. . . .
)	

Rule 217; RCW 82.32.145: RETAIL SALES TAX – TRUST FUND ACCOUNTABILITY ASSESSMENT – RESPONSIBLE PERSON. 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 had the responsibility for filing returns or paying the collected retail sales tax. A sales manager with authority to sign checks was not a responsible person where he neither controlled trust funds nor was responsible for filing returns or paying taxes.

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.

Callahan, A.L.J. – Corporate sales manager protests the assessment of individual trust fund liability for retail sales tax collected by the corporation but not remitted to the state. We grant the petition.¹

ISSUE

Whether a corporate sales manager, who had check signing authority, but who allegedly neither controlled trust funds nor was responsible for filing the sales tax returns, is a responsible person under RCW 82.32.145 and WAC 458-20-217(8).

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

FINDINGS OF FACT

Taxpayer . . . was the manager of [a corporation that sold products in] Washington The Corporation closed its operations without paying the taxes it owed for the months of May, June, and July of 2006 and March of 2007. The Department of Revenue (the “Department”) audited the Corporation’s books and records, which showed that, during the period of February 2002 to April 2007, Taxpayer had check signing authority, was aware of the May and June 2006 tax liability, signed checks to creditors other than the Department during the reporting period, and that Taxpayer was responsible for tax collecting and reporting under a management agreement with the Corporation. As discussed infra, when this agreement was terminated is at issue in this case.

The Department’s Compliance Division also discovered that Taxpayer filed a Master Application with the Department of Licensing on April 26, 2006, claiming 100% ownership of the Corporation. As discussed infra, whether Taxpayer in fact had an ownership interest is at issue in this case.

Based on this information, and after determining that there was “no reasonable means of collecting the retail sales tax funds held in trust directly from the corporation”² pursuant to RCW 82.32.145, . . . Compliance issued a Trust Fund Accountability Assessment (TFAA) . . . for tax period of May 2006 and June 2006³ to Taxpayer personally for the Corporation’s trust fund debt Taxpayer petitioned the Department’s Appeals Division requesting correction of the assessment. . . .

Taxpayer represents that he became a sales manager of the [the corporation] in February 2001. Taxpayer states that in 2004, the Owner, who was also [a] General Manager (hereafter referred to as the “Owner”) offered him the opportunity to purchase a [small percentage of the] ownership interest in the Corporation for \$. . . . According to Taxpayer, there was no legal documentation executed between the Owner and Taxpayer to establish the ownership interest in the Corporation despite the repeated requests that Taxpayer made. Taxpayer further represents he accepted the Owner’s request to become the acting general manager . . . of the Corporation on a temporary basis in October 2004.

A copy of Addendum to Certificate of Authority from the Corporation’s banking institution . . . discovered by the Compliance Division indicated that Taxpayer’s name was added as an

² The Department’s Compliance Division attempted to collect unpaid taxes owed by the Corporation through levies against the Corporation’s bank accounts, which were either not found or were closed or had no funds available. [Shortly after the corporation ceased doing business] revenue agents went to the Corporation’s business location to confirm the business closure statement [and] a senior revenue agent went to the Corporation’s business location to ensure all assets and inventories were gone. Compliance found no corporate assets to satisfy the tax debt.

³ Taxpayer was assessed for the taxes owed for May, June and July 2006 originally. Compliance amended the trust fund assessment to include only the months of May and June 2006 after taking into account that Taxpayer’s employment with the Corporation was terminated on August 4, 2006 and the July 2006 return was not due until August 20, 2006.

authorized signer among the other authorized signers on October 8, 2004 On October 15, 2005, Taxpayer entered into a Stock Purchase and Sale Agreement (hereafter referred to as “Sale Agreement”) with the Owner to purchase the Owner’s interests in the Corporation. A management agreement (“Management Agreement”) was executed between the parties at the same time. Under the terms of the Sale Agreement, Taxpayer would contribute capitalization to the Corporation before or on the closing date in exchange of all the shares of interests (100%) that the Owner had in the Corporation. The Sales Agreement also provided that either party may terminate the agreement if Taxpayer did not fulfill his obligation by contributing the capitalization set forth in the Sales Agreement by the closing date The Management Agreement, in relevant part, provided:

Upon execution hereof, Dealer [the Corporation] retains Operator [Taxpayer] to be the Manager of the Dealer’s business until such time that the Agreement [Stock Purchase and Sale Agreement] closes or is terminated pursuant to the terms thereof.

(Emphasis added). Thus, under the terms of the Management Agreement, it would be effective until the closing or until the Sales Agreement terminated pursuant to its terms. Under the Management Agreement, Taxpayer was responsible to collect and report the retail sales tax. . . . On appeal, Taxpayer submitted an email he sent to the Owner dated June 19, 2006, stating he would not be able to close the Sale Agreement, which indicated that the Sales Agreement was terminated on June 9, 2006. Taxpayer asserts that he stepped down from being the acting general manager of the Corporation to the sales manager after the termination of the Sales Agreement.

Taxpayer contends that he is not a “responsible person” under RCW 82.32.145 on appeal because he did not have any control or decision-making concerning which creditors were paid after he was demoted to be the sales manager when the Sales Agreement did not go through. Taxpayer argues that although he still had the check signing authority, but it was solely for the convenience of the business operation and he signed the checks prepared by the office manager/comptroller upon authorization by the Owner of the Corporation. In support of his claim that he is not a responsible person, Taxpayer provided an affidavit from the Corporation’s former office manager/comptroller on appeal. The office manager/comptroller stated in this affidavit that during the months of June to August 2006, Taxpayer was no longer in charge of the Corporation, had no control of the Corporation’s funds, and was not responsible for the payments of the Corporation’s taxes and other debts. In essence [the office manager/comptroller] represented that it was the Owner that made all the financial decisions and directed the authorization of payments. [Taxpayer] argues that since his demotion, he worked under the authority of the Owner and left the office management to the CFO and the Owner. In support of this assertion, Taxpayer submitted a copy of an Electronic Partial Payment Agreement between the Corporation and the Department signed by the Corporation’s CFO dated September 18, 2006.

ANALYSIS

In order for an individual to be personally liable for collected and unremitted retail sales tax: (1) the retail sales tax must be a corporate liability; (2) the corporation must have been terminated, dissolved, or abandoned; (3) the taxpayer must have willfully failed to pay or to cause to be paid such retail sales tax; (4) the taxpayer must have supervision or control over the trust funds or be responsible for reporting and remitting the tax; and (5) there must be no reasonable means to collect the tax from the corporation. RCW 82.32.145; WAC 458-20-217(6) (Rule 217). A taxpayer may avoid liability if he or she can show that the failure to pay or to cause to be paid such taxes resulted from circumstances beyond the taxpayer's control. *Id.*

Here, it is undisputed that the tax was the liability of a corporation, which had been abandoned . . . , and there were no reasonable means to collect it from any corporate entity. With respect to responsibility for unremitted sales tax, RCW 82.32.145 identifies two types of individuals who may be held liable. A party may be liable as a result of control or supervision over collected funds or as a result of having responsibility for the filing of returns or payment of the trust funds, to wit:

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 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.

RCW 82.32.145(1) (Emphasis added).

WAC 428-20-217(8) (Rule 217) is the administrative rule promulgated by the Department to administer the statute. Rule 217(8) defines the term “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.

Under the statutory scheme, a taxpayer who has the authority and the discretion to disburse funds for the benefit of creditors and who has check signing authority may be a responsible party. A corporate officer who has primary or secondary authority to file tax returns or to remit collected retail sales tax has been found to be a responsible party. *See* Det. No. 90-319, 10 WTD 319 (1990). Further, a corporate officer cannot be relieved of liability when a superior instructs the employee not to pay the taxes. Det. No. 95-101, 15 WTD 136 (1996).

Under the terms of the Management Agreement, Taxpayer clearly was a responsible person before the Management Agreement was terminated However, the Management Agreement was not applicable to the reporting period at issue because the May and June 2006 taxes were due after [the Management Agreement was terminated]. Thus, our inquiry turns to whether Taxpayer remained a “responsible person” after the termination of the Management Agreement from the objective facts.

In this case, Taxpayer had the authority to sign checks. Based on this evidence the Department presented a prima facie case of trust fund liability. In rebuttal, however, Taxpayer cited *City of Philadelphia v. GoInternet Net, Inc.* 935 A.2d 586 (Pa. Commw. Ct., 2007)⁴ to support his contention that having the check signing authority alone is not dispositive to determine he is a “responsible person” under RCW 82.32.145. In *GoInternet*, the taxpayer had authority to issue checks on behalf of the corporation. However, the Court in *GoInternet* reasoned that “each responsible person case is decided on the totality of the circumstances; with no single factor dispositive.” *Id.* at 595. We agree. *See* Det. No. 98-121, 18 WTD 113 (1999) (where the Department found that, although the taxpayers signed checks occasionally to pay trust funds to the state, the company’s president also signed such checks and the fact that the taxpayers were not presented with checks to sign during the period of delinquency, in and of itself, does not show a failure to inquire and gross negligence on the part of the taxpayers). *See also* Det. No. 93-114, 13 WTD 249 (1994) (where the Department concluded that a bookkeeper who drafts and signs corporate checks only at the instruction of others does not willfully fail to pay the sales tax to the Department of Revenue).

We conclude that Taxpayer’s check signing authority does not mean that Taxpayer had the authority to decide which bills should be paid or to pay bills. Det. No. 96-217R, 18 WTD 106 (1999). Before Taxpayer stepped down to be the sales manager, he enjoyed the status of a responsible party. However, when Taxpayer stepped down to be the sales manager, and he was under the authority of the Owner, who was in control of the Corporation (supported by the comptroller’s affidavit), Taxpayer no longer had the same authority and discretion. At that time, he lost his status as a responsible party. Accordingly, while Taxpayer continued to have the authority to sign checks, we find that the discretion to determine whether to pay the trust funds to the state was lacking for the period in question. Det. No. 95-101, 15 WTD 136 (1996).

The objective facts in this case support Taxpayer’s assertion that he was not engaged in the management of the Corporation when the tax under the assessment was due but rather engaged in selling . . . after the termination of the Management Agreement. This assertion is supported by the evidence provided and the corroborated by the comptroller’s statements. There is no

⁴ The federal courts have considered this issue in the context of a similarly worded provision under Section 6672 of the Internal Revenue Code, 26 U.S.C. § 6672. Because the federal and state trust fund statutes are intended to reach similar results, the Department may refer to cases under the federal statute for guidance in determining whether the taxpayer was a responsible party. *See Saue v. K.C., Inc.*, 19 Wn. App. 659, 665, 577 P. 2d 599 (1978), *aff’d*, 91 Wn.2d 698, 591 P.2d 1207 (1979).

evidence that Taxpayer had the authority to file the returns or pay the taxes for the months of May and June 2006. The evidence, i.e., a copy of the Electronic Partial Payment Agreement, supports Taxpayer's contention that it was the Corporation's CFO who was responsible for the Corporation's tax return preparation and remittance of tax payments. Therefore, we conclude that Taxpayer is not a "responsible person" under RCW 82.32.145. Because of this conclusion, we do not need to address whether Taxpayer "willfully failed to pay or to cause to be paid such retail sales tax". RCW 82.32.145.

DECISION AND DISPOSITION

Taxpayer's petition is granted.

Dated this 31st day of July 2008.