

Cite as Det. No. 15-0240, 35 WTD 272 (2016)

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. 15-0240
)	
...)	Registration No. . . .
)	

[1] RULE: 217; 82.32.145: RETAIL SALES TAX – TRUST FUND ACCOUNTABILITY ASSESSMENT – RESPONSIBLE INDIVIDUAL. The term “responsible individual” includes any current or former member of a limited liability business entity with an unpaid tax warrant issued by the Department.

[2] RULE: 217; 82.32.145: RETAIL SALES TAX – TRUST FUND ACCOUNTABILITY ASSESSMENT – WILLFUL FAILURE TO PAY TRUST FUND TAXES – CAUSE TRUST FUND TAXES NOT TO BE PAID. Except for the current or a former chief executive or chief financial officer of a limited liability business entity, a “responsible individual” is liable only for trust funds collected during the period he or she had the requisite control, supervision, responsibility, or duty to remit the taxes, plus interest and penalties on those taxes, and must have willfully failed to pay, or willfully caused to be paid, the trust fund taxes to the Department for that period.

[3] RULE: 217; 82.32.145: RETAIL SALES TAX – TRUST FUND ACCOUNTABILITY ASSESSMENT – LIABILITY OF MARITAL COMMUNITY – Marital Community is subject to Trust Fund Tax Liability, even if one spouse is not personally liable for the Trust Fund Accountability Assessment.

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.

LaMarche, A.L.J. – [A husband and wife are the former members of a now defunct limited liability company (LLC). The wife protests a trust fund accountability assessment (TFAA) against her and the marital community of her and her husband, contending that she was not involved in the day-to-day affairs of the business, was not responsible during the disputed period for collecting and remitting retail sales taxes, and that she did not willfully fail to pay those taxes.] We conclude that the former member was not personally liable for the TFAA because she did not have control or supervision of the collected funds or the responsibility of filing

returns or paying the taxes to the Department during the period at issue, but that her husband and the marital community are liable. We grant the petition in part and deny it in part.¹

ISSUES

1. Under RCW 82.32.145(9)(g)(i) and WAC 458-20-217 (Rule 217), is Taxpayer a “responsible individual” who may be held personally liable for trust fund tax liability resulting from retail sales tax collected but not remitted by her former business?
2. Under RCW 82.32.145(3)(b) and Rule 217, did Taxpayer willfully fail to pay or cause not to be paid to the Department the trust fund taxes for her former business?
3. Under RCW 82.32.145 and Rule 217, is the marital community of Taxpayer and her husband subject to trust fund tax liability?

FINDINGS OF FACT

[Taxpayer] is a former member of a defunct LLC (Company),² which Taxpayer and her husband (Husband) had formed for the purpose of owning and operating a restaurant. Taxpayer and Husband, the only members of the Company, filed a Certificate of Formation for the Company with the Washington State Secretary of State. . . , on July 16, 2007, which listed both Taxpayer and Husband as co-registered agents.

Husband and Taxpayer were listed as the only members and governing persons of the Company on its annual renewal form filed with the Secretary of State on January 23, 2010. On the annual renewal, filed July 25, 2012, Husband and Taxpayer were again the only two members listed; Husband was listed as president and Taxpayer was listed as vice president. . . .

Husband and Taxpayer were both authorized signors on the Company’s checking account at [Bank], which Company used as its business account for payment of taxes, including trust fund taxes. Compliance notes indicate that Husband signed all of the checks issued by the Company from its [Bank] account, and that Taxpayer’s signature does not appear on any of those checks.³

Taxpayer indicated, at the telephonic hearing on August 18, 2015, that she and Husband began in 2011 to have marital strife and substantial disagreements about how to run the business. Taxpayer stated that several years prior to purchase of the business, Husband had managed and directed the daily affairs of the restaurant for the previous owners. In 2011, due to escalating conflicts between Taxpayer and her spouse regarding their marriage and Husband’s management of the business, Taxpayer stated that she ceased her involvement in the day-to-day operations of the business, including the collection and remittance of trust fund taxes, and focused on her full-time job as a county court clerk. Taxpayer indicated that under her husband’s management, the business experienced significant financial problems and fell behind on its obligations. Taxpayer

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

² Taxpayer’s estranged husband did not file an appeal.

³ Automated Compliance System (ACS) notes. dated April 17, 2014

stated that although she was aware of the problems of the business, she did not act to remove herself as an owner or officer of the Company.

Taxpayer stated at the hearing that the Company's attorney began to prepare a Chapter 7 bankruptcy case for the Company, and requested that the Company prepare and file all unfiled tax returns in order to be in compliance with federal bankruptcy laws. Taxpayer indicated that Husband refused to collect documents necessary for the attorney to prepare the bankruptcy case, and that on the advice of counsel, she collected the needed information and asked the Company's accountant to prepare and file unfiled returns for the business.

Taxpayer separated from Husband in 2014, and filed for divorce on May 28, 2015. The LLC filed a Chapter 7 bankruptcy in October 2014, and was dissolved still owing trust fund tax liability to the state.⁴

The Department's Compliance Division (Compliance) notes indicate that all of the conversations about the Company's delinquent taxes prior to issuance of the TFAA were with Husband, and detail Husband's many promises of payments, and failure to comply with agreed due dates. Compliance notes, *supra*. The notes also indicate that Husband personally delivered some payments to the Department field office in efforts to stave off revocation of the business's tax registration endorsement. *Id.* None of the notes mentions any communication with the Taxpayer prior to or during the disputed period. *Id.*

The Company filed all of its state excise tax returns on time for periods from June 2013 through March 2014, except for the March 2014 return, which was filed on May 6, 2014. However, the Company did not pay the taxes due for most of those periods. The Department issued tax assessments for the unpaid periods, and after Husband made several failed attempts to catch up on the taxes or to make payment arrangements, the Department issued Warrant Nos. . . . ,⁵ . . . ,⁶ . . . ,⁷ . . . ,⁸ and . . .⁹ against the Company for unpaid taxes for certain tax periods during the disputed period, June 2013 through March 2014. The Department revoked the Company's Washington State tax registration endorsement on March 17, 2014 for its failure to pay its tax liability associated with Warrant Nos. . . . , . . . , . . . , . . . , and . . . , and the business closed on that day.¹⁰ The Company's accountant indicated to Compliance, on May 5, 2014, that Husband left the state shortly after the closure of the business. *Id.* In that conversation, the accountant

⁴ The LLC filed Chapter 7 Bankruptcy Case No. . . . , on October 29, 2014, in the U.S. Bankruptcy Court for the The Chapter 7 Trustee determined that there were no assets for creditors and paid no claims; the entity was dissolved owing trust fund tax liability to the state of Washington. The case was closed by the Court on January 9, 2015.

⁵ Warrant . . . was issued against Company, on September 5, 2013, and assumed Document No. . . . , a filed and unpaid tax return assessment for tax period June 2013.

⁶ Warrant . . . was issued against Company, on November 14, 2013, and assumed Document Nos. . . . and . . . , filed and unpaid tax return assessments for tax periods August and September 2013, respectively.

⁷ Warrant . . . was issued against Company, on January 9, 2014, and assumed Document No. . . . , a filed and unpaid tax return assessment for the tax period October 2013.

⁸ Warrant . . . was issued against Company, on March 20, 2014, and assumed Document No. . . . , a filed and unpaid tax return assessment for the tax period December 2013.

⁹ Warrant . . . was issued against Company, on May 7, 2014, and assumed Document Nos. . . . and . . . , filed and unpaid tax return assessments for tax periods February and March 2014, respectively.

¹⁰ Automated Compliance System (ACS) notes, dated March 17, 2014.

also stated that Taxpayer had spoken to her the previous week and gave her business documents for the Company, and asked her to complete and file the final business return. *Id.*

Because a secured creditor had a prior fixture lien on the majority of the Company's assets, the Department was unable to collect any monies to offset the Company's trust fund tax liabilities.

The Department concluded, on May 28, 2014, that the Company was a defunct corporation with no distrainable assets, that the Company's business registration had been revoked, and that attempts to collect the liability through garnishment had failed.¹¹

The Department issued a TFAA against Taxpayer, Husband, and their marital community, on July 28, 2014, in the amount of \$¹² Taxpayer timely appealed the TFAA. Husband did not file an appeal.

ANALYSIS

1. Responsible Individuals.

RCW 82.08.050 requires businesses that make retail sales to collect retail sales tax from their customers and hold it in trust until they pay it to the Department. Sellers who 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 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 certain "responsible individuals," including the imposition of a TFAA. RCW 82.32.145(1). Personal liability under RCW 82.32.145 may be imposed for state and local trust fund taxes. RCW 82.32.145(2).

Here, the Company collected and failed to remit trust fund taxes to the Department, and after the Department issued warrants against the Company, it was dissolved without payment of its trust fund tax liability. Therefore, under RCW 82.08.050(3), the Department properly determined that the entity was insolvent, and that personal liability could be properly imposed under RCW 82.32.145 against any or all of the responsible individuals. Taxpayer does not dispute these facts. We now discuss whether Taxpayer is a "responsible individual" under the statute.

RCW 82.32.145(9)(g)(i) states that the term "responsible individual" includes any current or former member of a limited liability business entity with an unpaid tax warrant issued by the Department. Here, Taxpayer and Husband are both former members of the Company. Therefore, we conclude that Taxpayer and Husband are responsible individuals, and may be personally liable for the Company's unpaid trust fund taxes under RCW 82.32.145(3)(b). *See*

¹¹ Automated Compliance System (ACS) notes, dated May 5, 2014.

¹² The TFAA, issued on July 28, 2014, in the amount of \$. . . , Document No. . . . , comprised \$. . . in trust fund taxes, \$. . . audit interest, \$. . . extended interest, a delinquent return penalty of \$. . . , a 5% substantial underpayment penalty of \$ Total remittances of \$. . . , from October 28, 2014 through July 30, 2015, were later received and applied to interest and penalties.

also Rule 217(8). We turn now to whether Taxpayer and Husband are personally liable for those unpaid taxes.

2. Personal Liability.

Strict Liability of Chief Executives and Chief Financial Officers. Under RCW 82.32.145(3)(a), a responsible individual who is the current or former chief executive or chief financial officer, is liable for the entity's unpaid trust fund tax liability, "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." The Department adopted Rule 217, in part, to administer RCW 82.32.145. Under Rule 217 the term "chief executive" means, "The president of a corporation; or for other entities or organizations other than corporations or if a corporation does not have a president as one of its officers, the highest ranking executive manager or administrator in charge of the management of the company or organization." Here, Husband was the Company's president and its highest ranking executive manager; therefore, we conclude that Husband is personally liable for the Company's unpaid trust fund tax liability. RCW 82.32.145(3)(a). Taxpayer was vice president. The facts presented do not indicate that Taxpayer had any significant role in the financial affairs of the Company [during the period June 2013 through March 2014,]. Therefore, we conclude that Taxpayer is not a responsible individual who is strictly liable under the provisions of RCW 82.32.145(3)(a).

Personal Liability of Other Responsible Individuals. If a "responsible individual" was not a current or former chief executive or chief financial officer, in order for that person to be responsible for the unpaid trust fund taxes, the individual must have willfully failed to pay, or willfully caused to be paid, the trust fund taxes to the Department. RCW 82.32.145(2)(b) and (3). "Willfully 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. RCW 82.32.145(9)(i). Rule 217 further elaborates,

"Willfully 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. Intent to defraud or bad motive is not required. For example, using collected retail sales tax or spirits taxes to pay other corporate obligations is a willful failure to pay the trust funds to the state.

Rule 217(8)(a)(i)(B). Rule 217(8)(g) goes on to state,

(g) Except for the current or a former chief executive or chief financial officer of a limited liability business entity, an individual is only liable for trust funds collected during the period he or she had the requisite control, supervision, responsibility, or duty to remit the tax, plus interest and penalties on those taxes.

Id. See also RCW 82.32.145(4)(b).

Here, the Department has not shown that Taxpayer was a "responsible individual" during the disputed period that had the requisite control, supervision, responsibility, or duty to remit the tax—a finding necessary to impose personal liability under RCW 82.32.145(9)(i) and Rule 217(8). We previously addressed the issue of personal liability under RCW 82.32.145 and Rule

217 in Det. No. 99-098, 20 WTD 334 (2001).¹³ The taxpayer in that case was a former president of the company, and had signed checks only upon the authorization from his superior. *Id.* We determined that he did not have control or supervision of the collected funds or the responsibility of filing returns or paying the taxes to the Department. *Id.* In concluding that the taxpayer was not personally liable under the statute, we stated,

It is not enough that a person be a corporate officer in order to be personally liable for collected retail sales tax. In addition to several other requirements, that person must also have control or supervision over those collected funds or be responsible for filing state tax returns or paying those collected funds to the Department.

Id. In the case here, Husband managed the affairs of the business both prior to and after the Company was formed, and Taxpayer left the affairs of the business—including the collection and remittance of trust fund taxes and the filing of excise tax returns—to Husband after she and Husband began to have strong disagreements about both personal issues and the affairs of the business.

Moreover, the Husband's course of conduct tends to show that Husband dominated the affairs of the Company, including the management of its collection and remittance of trust fund taxes. Although Taxpayer was a signor on the [Bank] account the Company used for paying taxes, Compliance noted that all of the checks on that account were signed by Husband, and not by the Taxpayer. All Compliance telephone communications were with Husband, and not the Taxpayer, and it was he, not Taxpayer, who made and broke several agreements with the Department with regard to delinquent taxes. It was also Husband who brought payments in person to the Department's field office, and who attempted to forestall the revocation of the business's license. The single time that Taxpayer is mentioned in Compliance notes is during the conversation with the Company accountant, who mentions that Husband had left the state and that Taxpayer collected and gave her the documents needed to file any unfiled returns. The latter action on part of the Taxpayer was on the advice of bankruptcy counsel after the period in dispute and only because Husband refused to collect any of the needed documents or take the action necessary to meet the attorney's request with regard to the bankruptcy case.

Under the facts here, we do not find that Taxpayer had control or supervision of the collected funds during the disputed period from June 2013 through March 2014, or the responsibility during that period of filing returns or paying the taxes to the Department. Taxpayer only became involved in the Company's tax affairs in May 2014, after the business had closed and Husband had left the state, and after Company's bankruptcy attorney advised her that the final tax returns for the business had to be filed in order to comply with federal bankruptcy laws—and that only after Husband refused to collect the needed documents and information himself. We conclude

¹³ RCW 82.32.145 was amended in 2012, after Det. No. 99-098, 20 WTD 334 was issued in 2001. Laws of 2011-2012, ch. 39, § 8. RCW 82.32.145. Under RCW 82.32.145(1), the term "trust fund taxes" replaced the previous term "retail sales tax funds collected and held in trust under RCW 82.08.050" and the term "trust fund" replaced the word "sales". Section 145(2) was modified by replacing the term "sales" with "trust fund", and Section 145(3)(a) and (b) were modified to replace the term "sales" with "trust fund". Similarly, subsections 4(a) and (b), Section 5, and Section 7 were modified by replacing the term "sales" with "trust fund". These changes increased the scope of RCW 82.32.145 to include other types of trust fund taxes, and do not significantly alter our analysis in Det. No. 99-098, 20 WTD 334.

that Taxpayer did not willfully fail to pay or cause to be paid to the Department, the trust fund taxes due from the Company, and is not personally liable for its unpaid trust fund taxes under RCW 82.32.145(2)(b).

3. Liability of the Marital Community

Although Taxpayer is not personally liable, the marital community of Taxpayer and Husband is subject to trust fund tax liability. In Det. No. 97-168, 17 WTD 142 (1998)¹⁴ the taxpayer husband asserted that trust fund tax liability should not be asserted against his wife, arguing that the liability arose from the operation of a corporation that was the husband's separate property and that his wife was not involved in the operation of the business. We concluded that the Department was not barred from collecting unpaid trust fund taxes from the community, and stated,

In Washington community property law, the non-offending spouse is not liable for the tortfeasor spouse's actions. Sandgren v. West, 9 Wn. 2d 494, 115 P. 2d 724 (1941). However, if the tortious act “. . . results or is intended to result in a benefit to the community . . .,” such as the tort being committed during the course of income generating employment, then the community, including the non-offending spouse's income is liable. LaFramboise v. Schmidt, 42 Wn. 2d 198, 200, 254 P. 2d 485 (1953) and Farman v. Farman, 25 Wn. App. 896, 611 P.2d 1314 (1980). The husband's employment at the corporation was a benefit to the community and the trust fund violation occurred as part of that work. Consequently, the taxpayers' community, including the wife's income is liable for the taxes.

Id.

Here, as in 17 WTD 142, Husband's management of the Corporation was a benefit to the community and the trust fund violation occurred as part of that work. Moreover, Taxpayer here was also an owner of the Corporation when the trust fund violation occurred. Further, we have previously determined, consistent with Washington State case law, that trust fund tax liability is a joint and several tax liability.¹⁵ Therefore, although Taxpayer is not personally liable for the trust fund tax liability as to her separate property, both Husband and the marital community are each liable for the entirety of that liability.

In summary, under the facts here, we conclude that Husband, the former chief executive of the Company, is personally and strictly liable for unpaid trust fund tax liability. RCW 82.32.145 and Rule 217. Taxpayer did not have control or supervision of the collected funds or the responsibility of filing returns or paying the taxes to the Department during the period at issue, and is, therefore, not personally liable as a “responsible person” under RCW 82.32.145 and Rule

¹⁴ RCW 82.32.145 was amended after we issued Det. No. 97-168, 17 WTD 142 in 1997; however, none of the amendments have a bearing on that case or on the case here (see note 13).

¹⁵ See Det. No. 00-143, 20 WTD 170 (2001)(when multiple persons are liable under a trust fund accountability assessment, that liability is joint and several and not pro rata.) Although RCW 82.32.145 was amended after 20 WTD 170 was issued, those changes were only to nomenclature in the statute, and do not affect the determination. (see note 13).

217. However, because the marital community of both Husband and Taxpayer benefited from Husband's work and from the Company itself, the Department properly asserted the Company's trust fund tax liability against the marital community. *Sandgren v. West, supra; LaFramboise v. Schmidt, supra*; 17 WTD 142, *supra*. Both Husband and the marital community are jointly and severally liable for the unpaid trust fund tax liability. 20 WTD 170, *supra*. To the extent Taxpayer can show that certain of her property is non-commingled separate property, unrelated in any way to the Company or to Husband, that separate property is not subject to community liability for the trust fund tax liability, pursuant to Washington community property law. See *Sandgren v. West, supra; LaFramboise v. Schmidt, supra*; 17 WTD 142, *supra*.

We grant the petition in part and deny it in part.

DECISION AND DISPOSITION

Taxpayer's petition is granted in part and denied in part. Taxpayer is not personally liable for the unpaid trust fund tax liability; however, [Husband] and the marital community of Taxpayer and Husband are jointly and severally liable for said liability.

Dated this 3rd day of September, 2015.