

Cite as Det. No. 91-232, 12 WTD 13 (1993).

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 Corporate Officer)	No. 91-232
Liability of:)	
)	
. . .)	UNREGISTERED
)	
For the Retail Sales Tax of:)	
)	
. . .)	Registration No. . . .
)	Warrant No. . . .
)	

[1] RULE 217 & RCW 82.32.145 -- SALES TAX -- CORPORATE OFFICER'S LIABILITY -- WILLFUL FAILURE TO PAY. The act by a corporate president of failing to pay taxes until after the due dates of returns constituted willful failure to pay even though the bank exercised its set-off rights against the checking account. This is because the set-off occurred after the due date of the taxes. The account had sufficient funds on the due date. However, where failure to pay when set-off occurred prior to the due date for the remaining taxes, failure to pay was not willful.

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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: March 26, 1991

NATURE OF ACTION:

The corporate taxpayer filed returns but failed to pay the taxes reported. The Compliance Division assessed corporate officer liability against the marital community of the corporation's president and his spouse.

FACTS AND ISSUES:

Pree, A.L.J. -- The corporation was a car dealership doing business in Washington. Its president and his spouse, hereinafter referred to as President and Spouse, owned the outstanding stock.

The excise tax returns for August and October 1987 were filed late with the Department of Revenue. On December 7, 1987 the corporation's bank exercised its set-off right, seizing the funds in the corporation's account. The checks for the August and October returns which had been sent to the Department in early December were not honored and returned to the Department NSF. The corporation filed Chapter 11 bankruptcy December 15, 1987. The taxes for November and December 1987 were also unpaid.

On January 14, 1988 the Department issued a warrant for the unpaid taxes.

Under the plan for reorganization, which was adopted over the Department's objection, a new corporation was organized with a different owner and president. The plan provided that the new corporation would repay the Department in 72 monthly installments. Thirteen payments were received.

The Compliance Division applied the amounts received first to penalties, then to business and occupation taxes, leaving a balance of retail sales tax due. The new corporation went out of business. The Compliance Division sent President and Spouse a notice of individual corporate liability for the balance.

They dispute that they are liable for the corporation's taxes on the following grounds:

1. The Department agreed to the bankruptcy plan; and that relieved President and Spouse, who were not parties to the agreement, of their obligation;
2. The NSF checks were not a willful failure to pay but the result of the bank exercising set-off against the funds the corporation intended to use to repay the tax obligations;
3. Only the controlling officers at the time the corporation is abandoned were liable for the taxes; and
4. Spouse was not an officer of the corporation and is not liable for its taxes.

DISCUSSION:

[1] RCW 82.32.145 imposes personal liability on corporate officers for retail sales taxes collected but not remitted to the state 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.)

We will analyze the five requirements. The underlying retail sales tax liability was that of the corporation. The tax, imposed on car purchasers, was collected by the corporation from its customers but not paid to the state. RCW 82.08.050 provides that any seller having collected the tax, who fails to pay it to the department shall be personally liable to the state for the amount of the tax. The corporation was reorganized in bankruptcy and later terminated, dissolved, or abandoned. The first and second requirements of Rule 217 are met.

Regarding the third requirement, the corporation collected the retail sales tax. It deposited the tax in the corporate account. For the August (due September 25, 1987) and October (due November 25, 1987) returns, these trust funds were available¹ to meet the tax obligations of the corporation when those returns were due. The corporation did not pay the August and October returns on their due dates. The bank set-off occurred on December 7, 1987, long after payment was due. We find that the corporation willfully failed to pay the August and October retail sales tax held in trust.

The November and December taxes raise new issues. When the set-off occurred on December 7, 1987, the November and December (up to the date of set-off) retail sales taxes held in trust were seized by the bank. The corporation's failure to pay those taxes over to the state was not willful. The funds were not available, because they had been seized by the bank before they were due the state. The November return would have been due the 25th of December, 1987 and the December return would have been due in January, 1988.

Therefore, the corporation's failure to pay the November taxes and the December taxes was not willful. The third requirement of WAC 458-20-217(6)(d) is not met with respect to the November and December taxes. President and Spouse cannot be held personally liable for those taxes.²

¹ Unless the corporation converted these trust funds by paying other creditors.

² On December 15, about a week after the set-off, the corporation filed for protection under Chapter 11 of the Bankruptcy Code. Under Section 1107, the debtor in possession has the rights of

Regarding the fourth requirement, President had control and supervision over the trust funds. He was the corporate president authorized to disburse funds from the corporate checking account. He and Spouse owned 100% of the outstanding stock of the corporation at the time it filed for bankruptcy. He did in fact sign one of the checks for which there were insufficient funds. According to a bank signature card dated February 12, 1988, as president, he retained that authority during the bankruptcy.

Finally, the corporation is no longer in business. There is no reasonable means to collect the tax directly from the corporation.

To summarize at this point, President is liable for the August and October 1987 retail sales taxes. He is not liable for the November and December taxes. We will now address the issues raised by President and Spouse.

1. The Department agreed to the bankruptcy plan, and that relieved President and Spouse, who were not a party to the agreement, of their obligation.

Their assertion that the Department agreed to the plan is baseless. In fact, the Department objected to the plan. It was, however, adopted over the Department's objection. There was no provision in the bankruptcy plan relieving them of any obligation. Any agreement between President and the new business owner does not bind the Department, since the Department was not a party to that agreement.

2. The NSF checks were not a willful failure to pay but the result of the bank exercising set-off against the funds the corporation intended to use to repay the tax obligations.

the trustee. Under Section 1108, he may operate the business. Article II of the plan provides that administrative expenses incurred in the course of the debtor's business shall be paid pursuant to their terms. It is not clear whether taxes after December 15, 1987 were included in the December assessment. We do not know what President's role was after the bankruptcy filing. We note however, that under the plan, submitted March 22, 1988, a new owner took over the corporation. It appears that President's duties ended upon adoption of the plan. The taxes after December 1987 were not included in the assessment against President and Spouse and are not at issue here.

This is correct, regarding the funds seized by the bank prior to the due date for the November and December taxes. President should not be liable for these taxes, since the failure to pay was not willful. We caution other taxpayers to segregate these trust funds so it is clear to other creditors that they are the property of the state.

However, their failure to pay the August and October retail sales taxes was willful. The taxes were collected by the corporation and were available to pay the Department when the August and October returns were due.

3. Only the controlling officers at the time the corporation is abandoned were liable for the taxes.

They apparently base their interpretation of RCW 82.32.145(1) that at the time of

. . . [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 . . .

They contend that the officer who is held liable must be holding the position when the corporation goes out of business. We do not agree with their interpretation of this section. Rather, we believe that the legislature intended that the responsible officers would not be liable until the corporation ceased doing business. Under President and Spouse's interpretation, any officer could escape liability by resigning before an insolvent corporation dissolved.

We believe that the intent of the statute was to hold the officers responsible for funds held in trust for the state. If the officers pay other creditors or otherwise convert the state funds, they should be personally liable for them. The intent of the word "upon" was not to lock in the time which officers would be liable but to require the Department to exhaust its collection efforts against the corporation before proceeding against the responsible officers.

4. Spouse was not a officer of the corporation and is not liable for its taxes.

We agree that Spouse is not liable as an officer of the corporation. Her liability is limited to the marital community. Her only obligation, if any, is under community property law.

DECISION AND DISPOSITION:

The tax assessment is remanded to the Compliance Division for revision consistent with this Determination.

DATED this 23rd day of August 1991.