

Cite as Det. No. 95-059, 15 WTD 130 (1996).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
for Correction of Assessment of)	
)	No. 95-059
)	
. . .)	NOTICE OF INDIVIDUAL
)	CORPORATE LIABILITY
)	Re: . . .
)	Warrants . . . & . . .
)	

- [1] RULE 217; RCW 82.32.145: TRUST FUND ACCOUNTABILITY ASSESSMENT --COLLECTED RETAIL SALES TAX--WILLFUL FAILURE TO PAY OVER. Where a corporate president uses collected retail sales tax to pay non-tax obligations of the corporation, the corporate president willfully failed to pay over the collected retail sales tax.
- [2] RULE 217; RCW 82.32.145: TRUST FUND ACCOUNTABILITY ASSESSMENT --COLLECTED RETAIL SALES TAX--CIRCUMSTANCES BEYOND THE CONTROL. A landlord's failure to maintain the premises used by a corporation to operate its business does not constitute a "circumstance beyond the control" of the corporation for the purpose of relieving the corporate president from trust fund liability for collected retail sales tax.
- [3] RULE 217; RCW 82.32.145: TRUST FUND ACCOUNTABILITY ASSESSMENT --COLLECTED RETAIL SALES TAX--REASONABLE MEANS TO COLLECT DIRECTLY FROM THE CORPORATION. Where a corporation is dissolved, its cash depleted, and its assets abandoned, the Department does not have an obligation to pursue the assets through litigation in an attempt to retrieve the "trust funds" collected and held by the corporation. The Department is required to attempt to from a corporation only if it is reasonable to do so. If there is no reasonable means to collect from a corporation, the Department may endeavor to collect the "trust funds" from the responsible party(ies).

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 former president of a dissolved corporation protests the assessment of individual liability for retail sales tax collected by the corporation, but not remitted to the Department of Revenue.¹

FACTS:

Coffman, A.L.J. -- Corporation was formed in 1986 for the purpose of operating a restaurant in Washington. The taxpayer was an officer of Corporation from February 1986 through December 1992. The taxpayer served as the president of Corporation from January 1990 through December 1992. The taxpayer stated that in 1986, Corporation entered into a five-year lease with two five-year renewal options on the restaurant. The taxpayer stated that only Corporation could exercise these options.

Corporation had a history of delinquent payment of its state taxes. Forty-six (46) balance due notices were issued to Corporation between January 1988 through December 1992. It is noted that despite the chronic delinquency only two tax warrants were issued against Corporation. The tax warrants were issued for the periods April through October 1991 and March through December 1992. Corporation's registration was revoked by the Department in December 1992.²

The taxpayer explained that prior to 1990, Corporation maintained a special account for retail sales tax. During the taxpayer's term as president of Corporation, Corporation failed to remit all of the retail sales tax it collected.³ The taxpayer was responsible for the day-to-day operation of Corporation. His responsibilities, in consultation with the vice-president/treasurer, included determining which creditor would be paid and the amount of the payment. The taxpayer admitted during

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

² Corporation was administratively dissolved by the Office of the Secretary of State for nonpayment of fees.

³ The amount of collected and unremitted retail sales tax is not in dispute.

the telephone conference that collected retail sales tax was used to pay Corporation's other obligations.

In 1990, the bank, which held the mortgage on the building in which the restaurant was located, repossessed the building with the owner's consent. The taxpayer claims that the bank failed to maintain the premises which included several other retail establishments. Further, the taxpayer claims that in 1992 the bank unilaterally cancelled the lease and converted it to a month-to-month tenancy. The taxpayer claims that Corporation ceased operations as a direct result of the bank's actions.

After the closure of the restaurant, the taxpayer notified the Department that assets with an alleged value of over \$35,000 could be seized and used to pay the delinquent taxes.⁴ These assets were allegedly located at the restaurant. The Department, in response to the petition, stated that the ownership of the assets was in question, there was no place to store them pending sale, and possible security interests existed which had priority over the Department's lien. Therefore, the Department chose not to seize the assets.

ISSUES:

1. Are the alleged acts of third parties, which may have exacerbated a taxpayer's cash flow problems, sufficient to demonstrate a taxpayer's lack of willfulness in failing to pay over collected retail sales tax?
2. Was the Department's decision not to seize a corporation's assets a basis for overturning the assessment of individual liability where: the title to and ownership of the assets was questionable; value of the assets was unknown and unclear; and there was a possible superior lien?

DISCUSSION:

Persons making sales at retail are required to collect retail sales tax. The collected retail sales tax is required to be held in trust until paid to the Department. RCW 82.08.050. When a corporation collects and fails to pay over the retail sales tax, certain persons may be personally liable for the tax. RCW 82.32.145. WAC 458-20-217 (Rule 217) is the administrative rule that explains the circumstances which must exist prior to the assessment of individual liability. These circumstances are:

⁴ The taxpayer stated that this figure was based on the book value per Corporation's records. The taxpayer also stated that he does not have records to substantiate this value.

(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, there must be no reasonable means to collect the tax directly from the corporation.

The taxpayer agrees that retail sales tax was collected by Corporation and that Corporation has been dissolved. Further, the taxpayer admits that he was a responsible person.

1. Willful Failure to Pay Over Retail Sales Tax.

The taxpayer argues that his failure to pay over the collected retail sales tax was not willful. We do not agree. Rule 217(6)(g) states:

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.

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).

2. Circumstances Beyond the Taxpayer's Control.

The taxpayer also argues that the failure to pay over the collected retail sales tax was due to circumstances beyond his control. Specifically, the taxpayer argues that the bank forced Corporation to pay other bills by failing to maintain the premises. The bank's alleged failure caused reduced business for the restaurant and thus insufficient cash flow to pay other bills.

Assuming, without so finding, that the taxpayer's claims are true, the allegations do not constitute a basis to relieve the taxpayer of responsibility. Rule 217(6)(h) lists three examples of circumstances beyond the taxpayer's control which would justify relief. They are:

(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.

The taxpayer was aware of Corporation's financial problems. The unremitted retail sales tax was collected during 1991 and 1992. The taxpayer has not provided any evidence that "immediately prior to timely payment of collected retail sales taxes" that the bank took any action which caused Corporation's cash flow problems such as seizing Corporation's bank account.

In keeping with the examples set forth in Rule 217(6)(h), the taxpayer is not entitled to relief on the basis of "circumstances

beyond his control". Rather, we find that the taxpayer knew about Corporation's financial problems and knew that retail sales tax was collected in 1991 and 1992 and used for other purposes.

3. Reasonable Means to Collect the Taxes from the Corporation.

The taxpayer claims that the Department failed to seize assets which, if sold, would have generated the funds necessary to pay Corporation's taxes. The taxpayer argues that there was a reasonable means to collect the taxes from Corporation. Therefore, the taxpayer argues that the final condition, which must exist for individual liability listed in Rule 217(6)(d), was not met.

We disagree. RCW 82.32.145(5) and Rule 217(6)(i) provide that the Department must find that no reasonable means exist for collecting the retail sales tax from Corporation. Rule 217(6)(i) states, in part:

This standard, however, does not require that the department liquidate all assets of the corporation before it can pursue recourse under the theory of trust fund accountability.

Where a corporation is dissolved, its cash depleted, and its officers abandon its assets, the Department does not have the obligation to engage in protracted litigation to attempt to collect the trust fund money. The Department is required to collect from Corporation only if it is reasonable to do so. The Department determined that it was not reasonable for the following reasons:

- (1) The Department had copies of perfected security interest filings on Corporation's assets. These filings called into question the ownership as well as the net value of the assets.
- (2) The Department did not have any facilities available to store the property pending sale. Therefore, the costs associated with any sale of the assets would have been increased.
- (3) Corporation did not attempt to sell the assets. The taxpayer, as the president of Corporation, took no action to protect these assets. The taxpayer does not know what the bank⁵ did with the assets. The taxpayer's actions or inaction indicates that the alleged assets did not have significant value.

Under these circumstances, we find that the Department did not have a reasonable means to collect the tax from Corporation.

DECISION AND DISPOSITION:

⁵ The taxpayer assumes that the bank took the assets after Corporation abandoned the restaurant.

Taxpayer's petition is denied. This matter is being remanded to the Compliance Division for collection.

DATED this 16th day of March, 1995.