

Cite as Det. No. 99-098, 20 WTD 334 (2001)

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. 99-098
)	Registration No. . . .
)	YR. . . /Audit No. . . .

RULE 217; RCW 82.32.145: SALES TAX – COLLECTED BUT NOT REMITTED – PERSONAL LIABILITY. In order for personal liability to be imposed against a former corporate officer for retail sales tax that was collected but not remitted to the state, that officer must have had control or supervision of the collected funds or the responsibility of filing returns or paying the taxes to the Department. Where there is substantial evidence that an officer had neither that control nor that responsibility, personal liability will not be imposed.

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:

A former officer of a defunct corporation protests the assessment of personal liability asserted against him for sales tax collected by the corporation but not remitted to the Department of Revenue (Department).¹

FACTS:

Dressel, A.L.J. -- [The Company] built, sold, and installed modular homes. In October 1995 the company went out of business. At that time it owed excise taxes to the Department, including collected retail sales taxes as represented on Tax Warrant After examining the company's assets, the Compliance Division of the Department (Compliance) determined that the company had insufficient assets with which to satisfy the aforementioned tax debt. Compliance, then, considered the culpability of company employees for the sales tax and caused to be issued to . . . (taxpayer), a former president of the company, the above-captioned tax assessment.

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

The taxpayer has appealed that assessment. In doing so, he first contends that the tax liability of \$. . . could be satisfied out of corporate assets, namely amounts owed by several individuals to the company for homes they purchased.² Secondly, the taxpayer denies that he had control over the sales tax collected but not paid to the Department. He states that, contrary to the allegations of Compliance, he was never the comptroller of the company. [Officer], according to the taxpayer, was the administrative officer in charge of all bookkeeping and accounting. [Officer] directed the activities of [Bookkeeper]. [Officer] signed all tax returns and approved all bills and payments from the beginning of 1995 until the corporation shut down in October. While [the taxpayer] was authorized to sign checks on at least one bank account, he claims he "couldn't instigate any payments from the corporation." The taxpayer was replaced as president of the company by [Officer] April 1, 1995. At about that time, [Officer] purchased from the taxpayer the stock [the taxpayer] held in the corporation. From about that same time until the cessation of operations, the taxpayer worked for the corporation as a salaried employee. Additionally, the taxpayer claims that even as of December 1995, more than a month after the company shut down, sufficient funds remained in the corporation's sales tax bank account to pay the deficiency that is now asserted against the taxpayer.

ISSUE:

May the Department impose personal liability on a former officer of a defunct company when that former officer claims he had no sales tax responsibility during the period in question, April 1995 through September 1995?³

DISCUSSION:

A special fiduciary duty is statutorily imposed on those businesses that collect retail sales tax from their customers. According to RCW 82.08.050, ". . . the [retail sales] tax required by this chapter, to be collected by the seller, shall be deemed to be held in trust by the seller until paid to the department" (Bracketed inclusion ours.) In those situations where a seller does not pay collected sales tax to the Department, certain individuals associated with that seller may be held personally liable for payment of the collected sales tax. In this regard, RCW 82.32.145⁴ reads:

**Termination, dissolution, or abandonment of corporate or limited liability business--
Personal liability of person in control of collected sales tax funds.** (1) Upon termination, dissolution, or abandonment of a corporate or limited liability company business, any officer, member, manager, 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

² [Because we decide this case on other grounds we do not reach this issue.]

³ As per Tax Warrant

⁴ RCW 82.32.145 is further explained in WAC 458-20-217.

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, member or manager, 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.

(3) Persons liable under subsection (1) of this section are exempt from liability in situations where nonpayment of the retail sales tax funds held in trust is due to reasons beyond their control as determined by the department by rule.

(4) Any person having been issued a notice of assessment under this section is entitled to the appeal procedures under RCW 82.32.160, 82.32.170, 82.32.180, 82.32.190, and 82.32.200.

(5) This section applies only in situations where the department has determined that there is no reasonable means of collecting the retail sales tax funds held in trust directly from the corporation.

(6) This section does not relieve the corporation or limited liability company of other tax liabilities or otherwise impair other tax collection remedies afforded by law.

(7) Collection authority and procedures prescribed in this chapter apply to collections under this section.

As part of its report in this matter, Compliance obtained a written statement from [Bookkeeper], the company's bookkeeper, regarding day-to-day operations of the taxpayer. In it she stated, in part:

[Taxpayer] was asked and did resign as president of the corporation, on May 17, 1995. He remained on salary as the operations manager, until the business closed [in] October In that position he was required to over see the crews, order materials needed for the houses being built, and handle the problems that might arise between the company and any sub contractors.

My job was the bookkeeper and receptionist. I did all the accounts payables, accounts receivable, payroll and all data entry. All state and federal reports that had to be filed were my responsibility to make sure they were completed and given to [Officer] for approval and authorization to write a check to make any payments. I might have signed some of the reports by that time but only as the bookkeeper

All bills were due and payable the 10th of the following month in which they were received, ie. received by the 30th of June, due the 10th of July. Accounts payable reports were generated by the computer, then given to [Officer] for his review. By May of 1995, I would give [Officer] a balance sheet showing the current bank balance, anticipated receivables, estimated payroll costs and the accounts payables, [Officer] would select

operating costs to be paid first, such as the building lease, utilities, bank notes, payroll taxes. Accounts payables would then be reviewed and the invoices that were 60 to 90 days over due would be paid with the balance of any funds. After being instructed which bills would be paid, I would run the checks off the computer, and [Officer] would sign them. . . .

[VP] was hired as Vice President of Sales in October of 1994. At sometime in 1995 his title changed, but I do not recall when. At the same time of the title change he also became a corporate check signer. He only signed checks if [Officer] was unavailable to do so. He usually deferred all decisions to [Officer]'s opinion or authority. In my opinion [VP] made no decision on his own, or without first reviewing with [Officer].

In no material way has [Bookkeeper]'s statement been challenged by Compliance, the taxpayer, or anybody else, as far as we know. From it it is clear that the taxpayer had no direct responsibility for collecting, accounting for, or paying sales taxes. That function was handled by [Bookkeeper], per the directions of [Officer]. [Officer] made the decisions as to which bills would be paid and which bills would be deferred or not paid. Compliance acknowledges this on page two of its report. [Bookkeeper]'s statement, further, is consistent with statements made by the taxpayer in his petition for correction.

[1] 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. RCW 82.32.145. The Department has made no showing of such control or responsibility. Moreover, the taxpayer resigned as president just prior to the onset of the tax period in question. Under these circumstances, we conclude that the taxpayer is not personally liable for the retail sales tax at issue.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. The assessment and warrant are cancelled.

DATED this 22nd day of April 1999.