

Cite as Det. No. 00-143, 20 WTD 170 (2001)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

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| 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. 00-143 |
| |) | |
| ... |) | |
| |) | |
| ... |) | Registration No. ... |
| |) | Tax Assessment No. ... |
| |) | TRUST FUND ACCOUNTABILITY |
| |) | ASSESSMENT |
| and |) | for ... |
| |) | |
| ... |) | Registration No. ... |
| |) | Tax Warrant Nos. ... and ... |

- [1] RULE 217; RCW 82.32.145: TRUST FUND ACCOUNTABILITY ASSESSMENTS -- JOINT AND SEVERAL LIABILITY. When multiple persons are liable under a trust fund accountability assessment, that liability is joint and several and not pro rata.
- [2] RULE 217; RCW 82.32.145: TRUST FUND ACCOUNTABILITY ASSESSMENTS -- RELIANCE ON DECISIONS RELATED TO "100% PENALTY" CASES. Because the legislature modeled trust fund accountability assessments after the federal "100% penalty" used to ensure collection of social security and federal income taxes withheld from employees' compensation, the Department may use federal cases as an aid in interpreting Washington's trust fund accountability provisions.

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:

Former President and Secretary of a defunct corporation protest the assessment of trust fund accountability liability.¹

FACTS:

Coffman, A.L.J. -- . . . (Corporation) collected retail sales tax from its customers. It filed its combined excise tax returns on a monthly basis. However, Corporation failed to pay the taxes identified on several of [its] excise tax returns. Following attempts by the Department of Revenue (Department) Compliance Division to obtain payment of the delinquent tax payments, the Department issued tax warrants against Corporation. The Department entered into two partial payment agreements with Corporation, but neither was completed. The tax warrants remain unpaid. The Department revoked the tax registration of Corporation on December 1, 1999.

. . . (“President”) was the President of Corporation and . . . (“Secretary”) was the Secretary of Corporation. The Department issued a Trust Fund Accountability Assessment (TFAA) against President and Secretary, both of whom appealed. The TFAA reflected only collected, but unpaid, retail sales tax and associated late-payment penalties. The TFAA involves two distinct periods. Specifically, six months in 1995 and 1996 and four months in 1999.²

President and Secretary do not dispute they are partially liable for the first period. During the first period, the President and Secretary allege all four shareholders/officers of Corporation were actively involved in the financial and business activities of Corporation. During the first period all four shareholder/officers had check writing authority subject to the limitation that all checks over \$500 had to be signed by two of the four. Further, the President and Secretary allege that all four signed checks on frequent occasions. The tax returns were prepared and signed by the President. The President and Secretary allege the checks paying those returns were signed by two of the four shareholder/officers. The other two shareholder/officers ceased to be active participants in the business during the interim between the first period and the second period covered by the TFAA. Thus, President and Secretary agree they are liable for the second period.

The President and Secretary feel the Compliance Division unfairly treated them by allegedly reaching agreements³ with the other two shareholders/officers, but not reaching similar agreements with them. President and Secretary believe the four shareholders/officers should be held equally liable.

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

² Specifically, the first period involved the months of December 1995 and April through August 1996. The second period involved March, April, May, and September 1999.

³ The President and Secretary allege that the Compliance Division entered a settlement agreement with the former Vice-President and exonerated the former Treasurer of all liability. Because RCW 82.32.330 bars all Department employees from disclosing specific taxpayer information, we can neither admit nor deny the truth of these allegations.

ISSUE:

Is the Department required to proportionally allocate liability under a TFAA to the various persons who are liable thereunder?

DISCUSSION:

Prior to May 1, 1987, when a corporation collected retail sales tax and failed to pay it to the Department, the taxpayers of Washington had no process to collect the tax from those responsible for the nonpayment. RCW 82.32.145 now authorizes the Department to impose personal liability for the collected, but not paid, retail sales tax on the responsible persons. The Department adopted WAC 458-20-217 (Rule 217), which explains the requirements for a TFAA. Specifically,

(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.

Rule 217(6)(d).

President and Secretary do not dispute any of the five basic requirements for a TFAA. Rather, they dispute the extent of their personal liability as to the first period only.

[1] Liability under RCW 82.32.145 is joint and several. That is, the Department may collect the entire amount of the TFAA against any one of the responsible persons or any combination thereof. We reach this conclusion on two grounds.

First, RCW 82.32.145 states, in part:

(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 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.

(Emphasis added.)

Rule 217 (6)(e) states: “There may be more than one person liable under this statute if the requirements as to each are present.” Neither the statute nor Rule 217 limits the liability to a pro rata share. Rather, responsible persons are “personally liable for any unpaid taxes and interest and penalties on those taxes.” If we were to find that the liability was limited to a pro rata share, the citizens of the State of Washington could be deprived of the tax revenue RCW 82.32.145 was intended to collect. Also, responsible persons frequently claim that there are additional responsible persons and if the claim were to prove true, then the Department would not know how much to collect [from] each responsible person (a third or a fourth of the tax).

[2] Second, the legislative intent behind RCW 82.32.145 was to establish a process to obtain the retail sales tax that was collected and not remitted to the Department. The model used by the legislature was the federal “100% penalty” (26 U.S.C. § 6672), which provides that responsible persons may be held personally liable for the amount a corporation or partnership collected, but did not pay, in social security taxes and income tax withholdings. Likewise, Corporation collected retail sales tax, but failed to pay it to the Department.

When a statute is intended to reach a result similar to another statute, cases interpreting the similar statute can be used to interpret the statute under consideration. Specifically, the Court of Appeals has stated:

This statute has not been previously interpreted by the appellate courts of this state. In construing state statutes, we find guidance from the rule that if the state statute relates to the same subject matter as a federal act, the interpretations of the federal act may be used to assist in the interpretation of the state statute.

Albertson’s, Inc. v. Washington Human Rights Comm., 14 Wn.App 697, 699, 544 P.2d 98 (1976). The federal courts have interpreted § 6672 to mean the liability created is joint and several. See Brown v. U. S., 591 F.2d 1136, (5th Cir., 1979); Hartman v. U.S., 538 P.2d 1336 (8th Cir., 1996); Schultz v. U.S., 918 F.2d 164 (Fed. Cir., 1990). In Brown v. U.S., supra, the court said:

Because we conclude that both Brown and Sibley are liable for § 6672 penalties, the issue arises whether their indebtedness is joint and several or whether they are each only severally liable, and therefore owe only a pro rata portion of the total penalty. The Eighth Circuit has held that liability under § 6672 is joint and several, Hartman v. United States, 8 Cir. 1976, 538 F.2d 1336, 1340, but this circuit has never decided the question. For reasons set forth below, we agree that the liability of responsible officers for the penalty provided in § 6672 is joint and several; therefore, it is unnecessary for an apportionment of liability to be made in this case.

The language of § 6672 indicates that each responsible person is liable for a penalty equal to the total amount of the withholding tax not paid to the government; it provides:

"Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax ... shall ... be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

26 U.S.C. § 6672 (emphasis added). If Congress had intended § 6672 to impose only several liability, it would have provided that all of the responsible persons, together, were to be liable for the total amount of tax evaded. The legislative history of § 6672 does not touch upon this question ..., but joint and several liability is more consistent with the intent of Congress to ensure that withholding trust funds are turned over to the government; the government is more likely to recover the total taxes owed and the expected cost of such recovery will be less if liability is joint and several. It would be unduly burdensome for the government to have to sue each responsible officer in order to recover withholding taxes not paid voluntarily. In addition, there would be the risk that the government would not be able to recover the total amount owed if some responsible persons were judgment proof or if the number of officers found to be responsible varied from one suit to the next. Our conclusion that § 6672 liability is joint and several is also consistent with cases that have held that the existence of other responsible persons does not affect or preclude recovery of a § 6672 penalty in the amount of the entire tax owed from one of the persons responsible for a corporation's payment of withholding taxes ... and with a Fifth Circuit case that held two officers liable for a § 6672 penalty for the same period without apportioning liability

Ibid., at 1142. (Internal citations omitted.)

We find the reasoning for imposing the joint and several liability in 100% penalty cases has equal application to TFAA under Washington law.

DECISION AND DISPOSITION:

The taxpayers' petitions are denied.

Dated this 26th day of July, 2000.