

Cite as Det. No. 15-0057, 34 WTD 416 (2015)

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>
Trust Fund Accountability Assessment of)	
)	No. 15-0057
)	
. . .)	Registration No. . . .
)	

[1] RULE 217; RCW 82.32.145: TRUST FUND ACCOUNTABILITY ASSESSMENT – TFAA – LIMITED LIABILITY COMPANY – LLC – RESPONSIBLE PERSON – CHIEF EXECUTIVE. For periods after May 1, 2010, the owners of an LLC who were the highest ranking executive managers in charge of running the LLC were “chief executives” and subject to the TFAA regardless of whether they willfully failed to pay the collected trust funds.

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.

Pree, A.L.J. – An owner of a limited liability company protests a trust fund liability assessment against him individually. Because the owner was a responsible individual for the retail sales taxes collected by the company, the owner was personally liable for the sales tax, including interest and penalties on the sales tax collected, but not remitted. We deny the petition.¹

ISSUE

Under RCW 82.32.145 and WAC 458-20-217 (Rule 217), was the owner liable for retail sales tax, including interest and penalties, collected by the LLC, but not remitted?

FINDINGS OF FACT

[Owner] was a 50% owner of [the LLC], a Washington limited liability company organized on February 8, 2008 that has been inactive since June 1, 2011. The LLC was in the construction business. The owner managed the LLC, as did the other 50% owner. The LLC did not have a president or vice president. On the Master Licensing Application for the LLC, both members (one of which is the owner) are listed as the “governing persons” of the LLC. The LLC does not have one managing member.

The LLC failed to remit sales taxes to the Department of Revenue (Department) that it collected for the second and third quarters of 2010. (April 1, 2010 through September 30, 2010). The Department’s Compliance Division issued assessments against the LLC, which the LLC failed to

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

pay. The Compliance Division then issued the above referenced warrants. The owner signed a statement that he gave to Compliance Division in which he acknowledged that he would be held personally responsible for the taxes collected by the LLC.

When the LLC failed to pay the warrants, the Compliance Division investigated the owner. Based on the information available, the Compliance Division concluded that the owner was a person responsible for the LLC's taxes. On September 15, 2014, the Compliance Division issued Assessment No. . . . against the owner. The assessment totaled \$. . . , and included \$. . . in retail sales tax for the 2nd and 3rd quarters of 2010, an assessment penalty of \$. . . , and \$. . . in interest. The taxpayer appealed the entire assessment.

The LLC collected the retail sales taxes at issue from its customers and used the funds to pay other bills so the LLC could finish other projects. The owner explained that after a major customer failed to pay the LLC for work it performed, the LLC was unable to pay its bills, including its taxes. The LLC was closed with its taxes still due. The owner states that it has no money and cannot pay its bills.

The owner states that the other 50% owner paid the LLC's bills. The owner contends that he did not write the LLC's checks. He doesn't believe that he had check signing authority, but was unable to provide the signature card from the LLC's bank.²

ANALYSIS

In general, a member or manager of a limited liability company is not liable for a debt of the limited liability company. RCW 25.15.040; RCW 25.15.060. RCW 82.32.145³ creates an exception, which imposes personal liability on all responsible individuals for trust fund taxes collected by the limited liability company, including penalties and interest on those taxes. RCW 82.32.145(1).

For responsible individuals who are also the "chief executive or chief financial officer," liability for unpaid trust funds applies "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." RCW 82.32.145(3)(a). "Chief executive" generally refers to the president of a corporation; however, RCW 82.32.145(9)(a) also explains that a chief executive would include "for other entities or organization other than corporations or if the 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."

For a responsible individual who is not the current or a former chief executive or chief financial officer, liability under RCW 82.32.145 applies only if he or she willfully fails to pay or to cause to be paid to the Department the trust fund taxes due from the limited liability business entity. RCW 82.32.145(3)(b). "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). For

² Since the LLC was closed, the bank was acquired by another bank and reorganized. The owner states that the new bank was unable to find the old signature cards.

³ RCW 82.32.145 was amended by Section 801 of 2ESSB 6143, effective May 1, 2010. One month, April 2010, [is governed by] the law in effect prior to May 1, 2010.

the version of RCW 82.32.145 in effect prior to May 1, 2010, all responsible individuals are liable for collected trust funds only if they willfully failed to pay the collected tax.

The owner acknowledged that he was responsible for the taxes collected by the LLC. A responsible individual includes any current or former member of a limited liability business entity with an unpaid tax warrant issued by the Department. Rule 217(8)(a)(i). As an owner of an interest in the LLC, the owner was a member of the LLC under RCW 25.15.115. Therefore, he was liable for the LLC's trust fund taxes including penalties and interest on those taxes.

RCW 82.32.145(9)(h) defines "trust fund taxes" as taxes collected from purchasers and held in trust under RCW 82.08.050, including taxes imposed under RCW 82.08.020. Retail sales taxes are imposed under RCW 82.08.020 and held in trust under RCW 82.08.050. Therefore, the owner was liable for the retail sales taxes collected, held in trust, but not remitted to the Department.

In this case, the LLC did not have a president or other corporate officer. Its two members were the owners in charge of running the LLC. They both were the highest ranking executive managers in charge of running the LLC. As such, the owner is a "chief executive" and subject to the TFAA regardless of whether he willfully failed to pay the collected trust funds for all periods after May 1, 2010.

For the one month prior to May 1, 2010, when the prior version of the statute was in effect, we must consider whether the owner willfully failed to pay the collected trust funds to the Department. The willful failure to pay or to cause retail sales taxes to be paid does not require an intent to defraud or bad motive. Rule 217(8)(c)(i)(A); Det. No. 99-041, 18 WTD 446, 451 (1999). A responsible person with knowledge that a business is in financial trouble, but who fails to inquire whether funds are available to pay trust funds when due, may be held personally liable as a matter of law. *Id.* Using the collected retail sales tax to pay the LLC's other obligations was a willful failure to pay the trust funds to the state. Rule 217(8)(c)(i)(A).

The statement signed by the owner clearly shows that the owner had knowledge the LLC was in financial trouble and the owner took responsibility for the LLC's retail sales taxes. We conclude that the Compliance Division properly assessed the owner for the collected, but unremitted retail sales taxes for the second and third quarters of 2010, including penalties and interest on those taxes.

DECISION AND DISPOSITION

We deny the owner's petition.

Dated this 4th day of March 2015.