

Cite as Det. No. 15-0081, 34 WTD 431 (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>
Assessment of)	
))	No. 15-0081
))	
...)	Registration No. . . .
))	

[1] RCW 82.32.145: TRUST FUND ACCOUNTABILITY ASSESSMENT – ISSUANCE OF ASSESSMENT. The Department is not required to issue trust fund assessments against all responsible persons; it has statutory discretion to choose to assess a trust fund assessment.

[2] RCW 82.32.145 – TRUST FUND ACCOUNTABILITY ASSESSMENT – RESPONSIBLE PERSON – LIMITED LIABILITY COMPANY. The person identified as President and Managing Member of limited liability company is a “responsible individual” and was acting as the “chief executive” of the company and, therefore, is strictly liable for unremitted retail sales tax.

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.

Anderson, A.L.J. – The managing member and president of a bar/nightclub protests a trust fund accountability assessment (“TFAA”) for collected and unremitted retail sales tax on the basis that she should not be solely liable because she was not the only person making financial decisions. Petition denied.¹

ISSUES

1. Does RCW 82.32.145 permit the Department to assess the full amount of unpaid trust fund taxes against one responsible person, when there are other potentially responsible persons?
2. As president and managing member, did Taxpayer serve as the chief executive officer of [an LLC], per RCW 82.32.145?

FINDINGS OF FACT

On April 13, 2011, [Taxpayer] filed a Certificate of Formation for a Limited Liability Company for the [LLC] with the Washington State Secretary of State (“Secretary of State”). On

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

September 23, 2011, Taxpayer filed an Initial Annual Report for the [LLC], with the Secretary of State, and in it, identified herself as both President and Managing Member of [the LLC] and listed no other corporate officers or directors.

On March 30, 2012, Taxpayer submitted a Business License Application for [the LLC] with Washington State Business License Services and listed herself, [Partner A], and [Partner B], as each owning a 33% membership interest in [the LLC]. On April 13, 2012, Taxpayer filed a Profit Corporation Renewal & Annual Report for [the LLC] with the Secretary of State and listed herself, [Partner A], and [Partner B] as corporate officers and directors and specified her role as “President.” Taxpayer also identified herself as the Managing Member of [the LLC] in a Resellers Permit Application and Electronic Funds Transfer Authorization Agreement, both submitted to the Washington State Department of Revenue (the “Department”).

At some point in 2012,[the LLC] began operating as a bar/nightclub. From November 2012 through February 2013, [the bar/nightclub] reported collected retail sales tax, but, it did not remit the collected retail sales tax to the Department. On February 28, 2013, [the bar/nightclub] closed, and [the LLC] became inactive with the Secretary of State on April 29, 2013. The Department filed Tax Warrants Nos. . . . and . . . , with . . . County Superior Court, against [the LLC].² The Department recovered some of the unremitted retail sales tax through a bank account levy; however, balances remain outstanding on both tax warrants.

On September 18, 2013, the Department issued a TFAA against Taxpayer for the amounts of [the LLC’s] unremitted retail sales tax (still outstanding from Tax Warrants Nos. . . . and . . .). Taxpayer appeals the TFAA and asserts that her ownership percentage was 25% rather than 33%, and she does not feel it is justified to hold her personally liable for the business’s tax debt when she was not solely responsible for financial decisions. Taxpayer also asserts that she was listed as President in filings, but that she was not in fact the President of the LLC.

ANALYSIS

Retail sales tax is paid by the buyer to the seller and held in trust, by the seller, until paid to the Department. RCW 82.08.050. RCW 82.32.145 authorizes the Department, under certain circumstances, to attempt to collect unpaid trust fund taxes by issuing a TFAA. RCW 82.32.145 states as follows:

(1) Whenever the department has issued a warrant under RCW 82.32.210 for the collection of unpaid trust fund taxes from a limited liability business entity and that business entity has been terminated, dissolved, or abandoned, or is insolvent, the department may pursue collection of the entity’s unpaid trust fund taxes, including penalties and interest on those taxes, against any or all of the responsible individuals. For purposes of this subsection, “insolvent” means the condition that results when the sum of the entity’s debts exceeds the fair market value of its assets. The department may

² Tax Warrant No. . . . was issued and filed with . . . County Superior Court on March 28, 2013, in the amount of \$. . . (Cause No. . . .) and has an outstanding balance of \$. . . as of March 31, 2015.

Tax Warrant No. . . . was issued and filed with . . . County Superior Court on July 30, 2013, in the amount of \$. . . (Cause No. . . .) and has an outstanding balance of \$. . . as of March 31, 2015.

presume that an entity is insolvent if the entity refuses to disclose to the department the nature of its assets and liabilities.

(Emphasis added.) In stating “the department may pursue collection . . . against any or all of the responsible individuals. . .” RCW 82.32.145(1) plainly provides the Department with discretion as to which individuals it issues a TFAA. Therefore, whether the Department chooses to issue TFAAs for [the LLC’s] unremitted trust fund taxes to other individuals is a discretionary matter for the Department to decide and not a basis upon which we can grant relief. Taxpayer’s remaining assertion – regarding her role as President – relates to whether she is a “responsible individual.”

“Responsible individual” is statutorily defined and “. . . includes any current or former officer, manager, member, partner, or trustee of a limited liability business entity with an unpaid tax warrant issued by the department.” RCW 82.32.145(9)(g)(i). As a member of [the LLC], Taxpayer is a “responsible individual” and whether she was a 33% or 25% member is without consequence. However, potentially, the extent of her liability, as a “responsible person,” for the trust fund taxes, may be impacted by her role in [the LLC].

To the extent a “responsible individual” was also a current or former chief executive or chief financial officer – of the limited liability business entity – a strict liability standard applies, and that person is liable regardless of whether the individual was or should have been aware of the liability. RCW 82.32.145(3)(a). “Chief executive” means, “The president of a corporation; or for other entities or organizations other than corporations or if a 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.” WAC 458-20-217(8)(b)(iii). If a “responsible individual” was not a current or former chief executive or chief financial officer, in order for that person to be responsible for the unpaid trust fund taxes, the individual must have willfully failed to pay or cause to be paid to the Department, the trust fund taxes. RCW 82.32.145(3)(b).

Here, Taxpayer identified herself both as “President” and “Managing Member.” Both such roles are that of the chief executive corporate officer. WAC 458-20-217(8)(b)(iii); *See also* RCW 25.15.150 (Manager(s) have power to manage the business or affairs of the limited liability company). Further, no other specific officers have been identified. Therefore, we conclude that Taxpayer served as the chief executive officer of [the LLC], and, as both a “responsible individual” and chief executive officer, she is strictly liable for the unpaid trust fund taxes. Accordingly, we sustain the TFAA with respect to Taxpayer.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 31st day of March, 2015.