

Cite as Det. No. 14-0238, 34 WTD 346 (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. 14-0238
)	
...)	Registration No. ...
)	

[1] RULE 217; RCW 82.32.145: RETAIL SALES TAX – TRUST FUND ACCOUNTABILITY ASSESSMENT – RESPONSIBLE INDIVIDUAL. The highest senior manager who is responsible for overseeing the financial activity of the entire company is liable for trust fund taxes due for the duration of the time the individual held that post, regardless of whether the individual was aware of the unpaid trust fund tax liability.

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.

Weaver, A.L.J. – Taxpayer, the controller of a defunct corporation, appeals a trust fund accountability assessment (TFAA). Because we find that the Taxpayer held himself out to be and was acting in the capacity of a chief financial officer at the time a portion of the trust fund liability accrued, the assessment is sustained with respect to the unpaid sales taxes that accrued while Taxpayer was acting as chief financial officer. Taxpayer is not liable for the unpaid sales taxes that accrued after his position was terminated. Taxpayer’s petition is granted in part and denied in part.¹

ISSUES

Whether, under RCW 82.32.145, the controller of a corporation was acting in the capacity of a chief financial officer and is liable for a TFAA for unpaid sales taxes that accrued while he was acting in that capacity.

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

FINDINGS OF FACT

[Corporation] was founded by [President] and was jointly owned by President and his wife. The Corporation was a Washington corporation doing business as a full-service kitchen and bath remodeling contractor. In 2006, the Corporation hired [Taxpayer] as Controller.

Prior to Taxpayer being hired as Controller, the President managed all aspects of the Corporation's finance and accounting functions with the assistance of a bookkeeper. After being hired as Controller, Taxpayer's job responsibilities included reviewing and paying of accounts payable, reviewing and collecting accounts receivable, bank reconciliations, general ledger maintenance, payroll processing, preparing monthly financial statements, filing monthly excise tax returns, filing quarterly and annual payroll tax reports, submitting information to the company CPA for federal tax return preparation, annual budget preparation, cash flow forecasting, oversight of company computer systems, oversight of company benefits, coordinating equipment and facility leases, bank relations, and overseeing creditor and vendor accounts.

Taxpayer was authorized to sign checks on behalf of Corporation. Indeed, the record in this case shows Taxpayer signed numerous checks between April 19, 2012 [and] October 26, 2012, including checks to certain utilities, vendors, municipalities, the Chapter 13 Bankruptcy Trustee, the Washington State Employment Security Department, and the Washington State Department of Labor & Industries. Taxpayer admits he was authorized to sign checks on behalf of the Corporation, but states that the President always had the ultimate authority on how corporate funds were to be used.

On June 21, 2010, Taxpayer signed the "Profit Corporation License Renewal & Annual Report" with the State of Washington's Department of Licensing as a "Secretary" of the Corporation and he lists himself as a "corporate officer." On September 22, 2012, Taxpayer again signed the "Profit Corporation Renewal & Annual Report" on behalf of the Corporation, but, on this occasion, he identifies himself as "Controller" and does not list himself as an officer or a director of the Corporation.² Taxpayer maintains that he was never an officer of the Corporation and says that his identification as "Secretary" on the license renewal form was incorrect and he likely misidentified himself as an officer only for purposes of administrative convenience.

Taxpayer maintains that his position with the Corporation was "Controller" and that he was never an officer of the Corporation. However, certain documentary evidence contradicts this assertion. On October 10, 2007, Taxpayer signed a "Manufacturer's Sales and Use Tax Exemption Certificate" as "CFO." On October 10, 2007, Taxpayer signed a letter to a supplier, as "Chief Financial Officer" and signed a contract with that same supplier as "CFO." On July 10, 2012, Taxpayer signed a letter to the Corporation's lessor as "CFO."

According to Taxpayer, prior to 2009, the Corporation paid its bills on a timely basis and cash flow was not a problem. However, in the middle of 2009, the Corporation faced increasing financial pressures stemming from the economic slowdown. From 2009 through the end of 2011, the Corporation began drawing on lines of credit, running credit card accounts, accumulating

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unpaid rents, and drawing on company reserves in order to satisfy its suppliers and meet its tax obligations. The Corporation began making late payments of sales taxes collected in November, 2011. The November 2011 sales taxes were paid in January 2012. The Corporation continued to pay its sales tax obligations in arrears through May 2012. From May 2012 through October 2012, Taxpayer met regularly with the President to establish a payment strategy. Part of that strategy was to stop paying sales tax to the Department in order to pay other creditors. Eventually, the plan was that all nonessential personnel were to be laid off on October 12, 2012, no future jobs were to be started after October 15, 2012, and existing jobs were to be completed by mid-November 2012. Taxpayer, himself, was laid off on October 12, 2012, and the Corporation filed for bankruptcy on January 23, 2013.

On July 24, 2012, Taxpayer submitted the Corporation's May 2012 and June 2012 excise tax returns electronically without payment. On August 24, 2012, Taxpayer submitted the Corporation's July 2012 excise tax return electronically without payment. On September 14, 2012, the Compliance Division of the Department of Revenue (Department) issued a tax warrant for May 2012 and June 2012. On September 25, 2012, Taxpayer submitted the Corporation's August 2012 excise tax return electronically without payment. On October 5, 2012, the Compliance Division filed the tax warrant for May 2012 and June 2012 with the . . . County Superior Court. On October 19, 2012, the Compliance Division issued a tax warrant for August 2012. On October 25, 2012, Taxpayer electronically submitted the Corporation's September 2012 excise tax return electronically without payment.

Taxpayer states that he was laid off from the Corporation on October 12, 2012, because he was deemed nonessential personnel by the President. Taxpayer states that he volunteered some of his time after October 12, 2012 to assist the President in winding up the business, but that, after that date, Taxpayer was no longer an employee of the Corporation. The fact that Taxpayer did not sign or submit tax returns for October, 2012, November, 2012, or December, 2012, on behalf of the Corporation is consistent with Taxpayer's assertion that he was no longer employed by the Corporation after October 12, 2012. The excise tax returns for October, 2012, November, 2012, and December, 2012 were signed and submitted by President.

When the Corporation filed for bankruptcy on January 23, 2013, Taxpayer was identified in the Corporation's bankruptcy filings as "Chief Financial Officer." Taxpayer did not sign the bankruptcy filings himself and was identified as "Chief Financial Officer" by the Corporation's President. The bankruptcy filings also stated that Taxpayer had no ownership interest in the Corporation. Taxpayer disputes the title he was given in the bankruptcy filing, but agrees with the assertion in the bankruptcy filing that he had no ownership interest in the Corporation.

The Compliance Division received signed statements from various employees of the Corporation who attest that Taxpayer was the Chief Financial Officer or CFO of the Corporation. The Showroom/Office Manager stated that Taxpayer "was employed by [Taxpayer] as the CFO/Controller. Another employee of the Corporation characterized Taxpayer as "Chief Financial Officer the last 4-6 years." The General Manager in charge of Field Projects and Production for the Corporation states that Taxpayer was the "Chief Financial Officer" of the Corporation for several years. In response to these statements, Taxpayer provided sworn declarations of four former employees who state that Taxpayer's position was "Controller," that

he was never a “Chief Financial Officer” of the Corporation, and that he never served as an officer of the Corporation in any capacity. One of the declarations was from the “General Manager” who amended his earlier signed statement that Taxpayer was “Chief Financial Officer” to state that Taxpayer’s actual title was “Controller.”

Taxpayer maintains that he had no independent authority to collect or remit sales taxes to the Department. Taxpayer states that he only acted with the express authority of the President. He states that the President’s directive was to pay payroll and material suppliers first and to pay the Department only after those obligations were met. Taxpayer states that he was well aware that the Corporation was paying other creditors in lieu of remitting collected sales tax to the Department after May 2012, and concedes that he filed excise tax returns without payment for May, June, July, August, and September 2012. Taxpayer’s position is that he did not have the authority or discretion to override the President’s payment priorities, so when faced with the choice of reserving funds to pay sales tax or to fund payroll and purchase materials, he had no choice but to fund payroll and material purchases as instructed by the President.

The record has conflicting evidence on Taxpayer’s level of authority. The signed statements of two former employees of the Corporation stated that Taxpayer’s position was CFO or Chief Financial Officer also state that Taxpayer was in control of the company’s financials, including decisions on which creditors would be paid. Taxpayer provides his own sworn declaration that he did not have the authority to decide which creditors would be paid and has sworn declarations of four former employees of the Corporation who state that Taxpayer was not a CFO, but was a Controller, and had no authority to make payments to the Department without approval from President. Given this conflicting evidence, and for the reasons articulated in the analysis section below, the Department does not make a finding on the fact issue of whether Taxpayer had the authority to make payments to the Department absent approval from the President.

On June 28, 2013, the Compliance Division issued a Trust Fund Accountability Assessment (“TFAA”) against Taxpayer in the amount of \$ The TFAA included \$. . . in unpaid retail sales tax for June, 2012, \$. . in unpaid retail sales tax for May 2012, \$. . in unpaid retail sales tax for August 2012, \$. . in unpaid retail sales tax for September 2012, \$. . in unpaid retail sales tax for October 2012, and \$. . in unpaid retail sales tax for November 2012. The TFAA also contained a total of \$. . in delinquency penalties, \$. . in interest, and \$. . in other penalties. Taxpayer filed a timely appeal.

ANALYSIS

Businesses that make retail sales are required under RCW 82.08.050 to collect retail sales tax from their customers, hold it in trust until paid to the Department and report and remit the collected tax to the Department. Sellers who fail to collect retail sales tax or fail to remit collected retail sales tax to the Department are personally liable to the state for the amount of the tax. RCW 82.08.050(3). When a limited liability business entity, like a corporation, is dissolved or otherwise terminated owing collected but unremitted retail sales tax to the state, the Department may pursue collection of the entity’s unpaid trust fund taxes, including penalties and

interest on those taxes, against “responsible individuals.”³ RCW 82.32.145(1); WAC 458-20-217(8). There is no dispute in this case that the Corporation was dissolved owing collected but unremitted retail sales tax to the state.

RCW 82.32.145 defines “responsible individual” as “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). RCW 82.32.145 imposes personal liability for unpaid trust fund taxes on those specified individuals, in relevant part, as follows:

For a responsible individual who is the current or former chief executive or chief financial officer, liability under this section 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). A responsible individual who is a chief executive or chief financial officer is only liable for trust fund tax liability accrued during the period he or she was acting in those roles. RCW 82.32.145(4)(a).

The term “chief financial officer” is defined by statute, as follows:

“Chief financial officer” means: The treasurer of a corporation; or for entities or organizations other than corporations or if the corporation does not have a treasurer as one of its officers, the highest senior manager who is responsible for overseeing the financial activities of the entire company or organization.

RCW 82.32.135(9)(b). There is no evidence, in this case, that the Corporation had a treasurer as one of its officers. Therefore, the relevant inquiry in this matter is whether Taxpayer was the highest senior manager who is responsible for overseeing the financial activities of the entire company or organization. *Id.*

In this case, there are a number of conflicting facts on the issue of whether Taxpayer’s official title was “Chief Financial Officer” or “Controller.” While there is evidence that Taxpayer held himself out as the “CFO” or “chief financial officer” of the Corporation, there is other evidence that Taxpayer’s actual job title was “Controller” of the Corporation. However, under the statutory authority of RCW 82.32.135(9)(b), Taxpayer’s official title is irrelevant. The operative question is whether Taxpayer meets the statutory definition of a “chief financial officer.” *Id.*

Taxpayer’s job responsibilities included reviewing and paying of accounts payable, reviewing and collecting accounts receivable, bank reconciliations, general ledger maintenance, payroll

³[The Department may pursue collection against “any and all” of an entity’s responsible individuals. RCW 82.32.145(1). Thus,] liability under a TFAA is joint and several. Det. No. 00-143, 20 WTD 170 (2001). That is, the Department may collect the entire amount of the TFAA against any one of the responsible individuals or any combination thereof. *Id.* Therefore, the potential culpability of the President does not absolve the Taxpayer of any TFAA liability, as the Department has the right to collect the full amount of the TFAA against any responsible individual. Because it is beyond our purview, we decline to opine whether the President or any non-party to this appeal is a “responsible individual.”

processing, preparing monthly financial statements, filing monthly excise tax returns, filing quarterly and annual payroll tax reports, submitting information to the company CPA for federal tax return preparation, annual budget preparation, cash flow forecasting, oversight of company computer systems, oversight of company benefits, coordinating equipment and facility leases, bank relations, and overseeing creditor and vendor accounts.

Taxpayer also had the responsibility to report collected sales tax to the Department and to file excise tax returns. Indeed, Taxpayer filed excise tax returns with the Department for May, June, July, August, and September 2012, and remitted those returns without payment. Taxpayer also had significant control of corporate funds, including the sales taxes held in trust. During the period of delinquency, Taxpayer accessed the corporate checking account and paid vendors and other creditors instead of remitting collected sales tax to the Department.

Moreover, Taxpayer represented himself as an officer of the Corporation in an official filing with the State of Washington. Taxpayer named himself as an officer on a “Profit Corporation License Renewal & Annual Report” filed with the Department of Licensing on September 21, 2010. We are not persuaded that Taxpayer’s signed representation of his status as an officer was a mere oversight or was done for the “purpose of administrative convenience,” given the other information we have about Taxpayer’s role at the Corporation. Taxpayer had significant control over the funds of the Corporation and was responsible for filing corporate excise tax returns. He also held himself out as “Chief Financial Officer” or “CFO” on multiple occasions.

Frankly, on the facts provided, there is no other individual at the Corporation who could reasonably be considered as “the highest senior manager who is responsible for overseeing the financial activity of the entire company.” The President was the “chief executive officer” as that term is defined by statute, and Taxpayer was the “chief financial officer.” *See* RCW 82.32.195(9)(a), (b). Because we find Taxpayer was the “chief financial officer” of the Corporation, Taxpayer is liable for the unpaid trust fund tax liability for the time that he was acting in that capacity. *See* RCW 82.32.145(3)(a).

Taxpayer takes the position that he cannot be liable for the failure to remit sales tax to the Department because he was not authorized by the President of the Corporation to pay the Department. However, as stated above, under RCW 82.32.145, a chief financial officer is liable for the unpaid trust fund taxes of the Corporation, regardless of fault. Therefore, Taxpayer is liable for the amounts of the TFAA regardless of the actions of the President.

Finally, there is the issue whether Taxpayer should be held liable for the trust fund taxes that accrued after he was laid off by the Corporation on October 12, 2012. RCW 83.32.145(4)(a) reads as follows:

(4)(a) Except as provided in this subsection (4)(a), a responsible individual who is the current or a former chief executive or chief financial officer is liable under this section only for trust fund tax liability accrued during the period that he or she was the chief executive or chief financial officer. However, if the responsible individual had the responsibility or duty to remit payment of the limited liability business entity's trust fund taxes to the department during any period of time that the person was not the

chief executive or chief financial officer, that individual is also liable for trust fund tax liability that became due during the period that he or she had the duty to remit payment of the limited liability business entity's taxes to the department but was not the chief executive or chief financial officer.

RCW 82.32.145(4)(a). On the evidence provided, we find that Taxpayer's employment was terminated on October 12, 2012. The excise tax returns for October 2012, November 2012, and December 2012, were signed and submitted without payment by the President of the Corporation. On the facts presented, we find that Taxpayer's position was terminated on October 12, 2012, and that he was no longer a responsible person after that date. For that reason, we hold that Taxpayer is not liable for the unpaid sales taxes that accrued after October 12, 2012.

DECISION AND DISPOSITION

Taxpayer's petition is granted in part and denied in part.

Dated this 25th day of July, 2014.