

Cite as Det. No. 16-0058, 35 WTD 531 (2016)

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. 16-0058
)	
... )	Registration No. ...
)	

[1] RCW 82.32.145; WAC 458-20-217: TRUST FUND ACCOUNTABILITY ASSESSMENT – CORPORATE OFFICER LIABILITY. Prior to May 1, 2010, a corporate officer was personally liable for collected but unremitted retail sales tax only if the corporate officer had a responsibility to remit payment of the tax to the Department but willfully failed to pay the tax. After May 1, 2010, a chief executive officer or chief financial officer became strictly liable for collected but unremitted retail sales tax regardless of whether the officer knew of the liability.

[2] RCW 82.32.160; RCW 82.32.145; WAC 458-20-217: TRUST FUND ACCOUNTABILITY ASSESSMENT – PETITION FOR CORRECTION OF UNDERLYING AMOUNT OF ASSESSMENT. The Department has no authority to correct the underlying amount of tax assessed to a corporation when reviewing a petition for correction of a trust fund accountability assessment against the corporation’s officers.

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.

Poley, A.L.J. – Two corporate officers of a now defunct computer installation and repair business protest a trust fund accountability assessment (TFAA) issued against them as individuals, stating that the amount assessed against the defunct business was in error. We conclude that the corporate officers are responsible for the corporation’s collected and unremitted retail sales tax and may not challenge the amount assessed against the underlying corporation. The assessment is affirmed.<sup>1</sup>

ISSUES

1. Is an officer of a corporation personally liable for collected, but unremitted retail sales tax under RCW 82.32.145?

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

2. May a “responsible person” petition for correction of the underlying amount assessed in a TFAA?

#### FINDINGS OF FACT

[Officer A] and [Officer B] (together, Taxpayers) were officers of the now defunct business, [Corporation]. Corporation operated as a computer network installation and repair business. Corporation formed in 2006 with [Officer A] as President. In 2011, Corporation went inactive for failing to file an annual statement. On August 3, 2011, Corporation filed a domestic corporation reinstatement report, listing [Officer A] as president and [Officer B] as secretary and treasurer. This arrangement continued through March 31, 2015, upon which Corporation’s annual renewal with Secretary of State expired.

Corporation’s bank listed [Officer A] as the signatory for Corporation’s bank account throughout Corporation’s existence. [Officer B] would later be added as a signatory. In 2009, [Officer A] submitted an electronic funds transfer authorization agreement to the Department of Revenue (Department), allowing the Department to electronically withdraw tax payments from Corporation’s bank account. [Officer B] began working for the business as a bookkeeper sometime around 2008. [Officer B] would calculate Corporation’s tax liability, file all combined excise tax returns, and initiate payment to the Department. [Officer B] would inform [Officer A] of the amount of the tax payments so [Officer A] would know how much the Department would withdraw from the bank account.

The Department conducted an audit of Corporation’s business for the period January 2010 through December 2013. The Department found that Corporation had incorrectly reported its income under the service and other B&O tax classification. The Department determined that Corporation’s business activities were retail sales subject to both the retailing Business & Occupation (B&O) tax classification and retail sales tax. The Department also discovered that Corporation had collected from its customers an amount labeled as “sales tax” on invoices. This amount corresponded to between 1.5 and 1.8 percent of each invoice’s selling price. The total amount of “sales tax” collected during the audit period was \$ . . . . The auditor discussed these findings with [Officer B] at a conference on July 28, 2014.

On August 5, 2014, the Department issued a tax assessment against Corporation for \$ . . . . , consisting of \$ . . . in tax (\$ . . . of which was collected retail sales tax trust funds), \$ . . . in interest, and a \$ . . . assessment penalty. Corporation failed to pay the assessment or petition for review by the October 6, 2014 extended due date. On November 14, 2014, the Department issued a tax warrant for the unpaid assessment. Corporation did not pay the tax warrant. The Department subsequently revoked Corporation’s certificate of business license registration on April 30, 2015.

On March 19, 2015, the Department composed a letter informing Taxpayers that they may be held personally liable for the retail sales tax trust funds collected but not remitted by Corporation unless Taxpayers made arrangements with the Department. A copy of the letter was mailed to [Officer A] at Corporation’s address and to [Officer A] at his personal residence. A copy of the

letter was also mailed to [Officer B] at the Corporation's address and to [Officer B] at her personal residence.

On September 14, 2015, the Department issued a TFAA against Taxpayers for \$ . . . , consisting of \$ . . . in retail sales tax trust funds, \$ . . . in audit interest, \$ . . . in extension interest, and a \$ . . . assessment penalty. On October 14, 2015, Taxpayers filed a petition requesting cancellation of the TFAA.

Taxpayers maintain that the "sales tax" shown on Corporation's invoices was not retail sales tax but a service fee to reimburse Corporation for its B&O tax liability. Taxpayers stated that Corporation's employees would not consistently remember to add the 1.5 or 1.8 percent fee when billing customers, so [Officer B] set up Corporation's Quickbooks program to automatically add the fee to each invoice. According to Taxpayers, the only way to add a percentage-based charge to an invoice in Quickbooks is by using the "sales tax" function. Taxpayers also claim that this function can only be labeled "sales tax" and will always link to the "sales tax payable" account. Taxpayers argue that Corporation never intended to collect retail sales tax and only labeled its service fee "sales tax" due to the software limitations of Quickbooks.

#### 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(1) states as follows:

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

Prior to May 1, 2010, a "responsible individual" was defined as any individual who "had the responsibility or duty to remit payment of the limited liability entity's unpaid trust fund tax liability reflected in a tax warrant issued by the department." RCW 82.32.145(9)(g)(ii). The statutory definition of "responsible individual" was amended as of May 1, 2010 to also include "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).

To the extent a "responsible individual" was a 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). The definition of “chief executive” includes the president of a corporation. RCW 82.32.145(9)(a). The definition of “chief financial officer” includes the treasurer of a corporation. RCW 82.32.145(9)(b).

For a “responsible individual” who was not a chief executive or chief financial officer after May 1, 2010, liability under RCW 82.32.145 applies only if the individual willfully fails to pay or cause to be paid the collected trust fund taxes. RCW 82.32.145(3)(b). As used here, “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). The willful failure to pay retail sales taxes does not require an intent to defraud or bad motive. WAC 458-20-217(8)(c)(i)(A); Det. No. 99-041, 18 WTD 446, 451 (1999). Using collected retail sales tax to pay other obligations is a willful failure to pay the trust funds to the state. *Id.*

The liability at issue here includes retail sales tax collected both prior to and after May 1, 2010. During the periods January through April 2010, [Officer A] had financial control over Corporation’s bank account and exercised that control by authorizing the Department to electronically withdraw tax payments from Corporation’s bank account. [Officer A] was also aware of Corporation’s tax liability as [Officer B] would keep him informed of the tax filings. As a result, [Officer A] was a responsible individual from January through April 2010. Additionally, [Officer A] was identified as the president of Corporation at all times during the audit period. Thus, [Officer A] is a responsible individual under RCW 82.32.145(9)(g)(i) and strictly liable for Corporation’s unpaid trust funds during the May 2010 through December 2013 periods.

[Officer B] was identified as secretary and treasurer of Corporation from April 2011 through December 2013. As treasurer, [Officer B] is the chief financial officer of Corporation, and therefore, a responsible individual under RCW 82.32.145(9)(g)(i) for those periods. Prior to being listed as an officer, however, [Officer B] filed Corporation’s tax returns and remitted payment of taxes from January 2010 through March 2011 and beyond. [Officer B] stated on appeal that she configured Corporation’s Quickbooks to add a charge to each invoice labeled “sales tax.” [Officer B] acted as bookkeeper for Corporation and calculated, filed, and paid the tax returns during the audit period, a conscious and voluntary course of action. Thus, [Officer B] is a responsible person during the January 2010 through March 2011 periods via her duty to remit payment to the Department. [Officer B] is liable for the unpaid trust funds of Corporation as she willfully failed to pay those funds to the Department. Accordingly, we sustain the TFAA with respect to Taxpayers.

The second issue raised by Taxpayers is whether the amount of the TFAA may be adjusted. Taxpayers maintain the TFAA assessment was in error because the assessment of Corporation was in error.

“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.” RCW 82.32.145(6). Thus, a person receiving a TFAA may petition for correction of the TFAA. Det. No. 15-0115, 34 WTD 537 (2015). However, in Det. No. 03-0066R, 23 WTD 243 (2004), the Department concluded that a taxpayer who had received a TFAA could not challenge the amount of the tax assessment underlying the TFAA. The taxpayer in that case asserted that the

corporation had not collected some or all of the taxes included in the TFAA. *Id.* In concluding that the individual taxpayer could not challenge the amounts underlying the TFAA, the Department stated:

The original taxpayer, the business, had an opportunity to contest the amount of taxes assessed when DOR issued the notices of balance due. RCW 82.32.160. It did not appeal. The statutory consequence is that “[i]f no such petition is filed within the thirty-day period the assessment covered by the notice shall become final.” RCW 82.32.160. Generally, once a tax assessment becomes final, there is no jurisdiction for DOR to accept a petition for correction of the assessment. *See* Det. No. 87-39, 2 WTD 189 (1987) and Det. No. 86-268, 1 WTD 245 (1986). The taxpayer can, however, pay the assessment and petition for a refund, and contest its liability for the tax in the refund proceeding.

23 WTD at 246.

Here, Corporation failed to file an appeal within 30 days of issuance of the assessment as required by RCW 82.32.160. Thus, consistent with prior rulings, we conclude that Taxpayers are not entitled to an adjustment of the amount of tax assessed against Corporation. However, even if we were permitted to adjust the amount of tax owed from the underlying audit of Corporation, Taxpayers’ argument would not succeed.

Retail sales tax is collected from the buyer and held in trust by the seller until remitted to the Department. RCW 82.08.050(2). When a seller does not remit collected retail sales tax “whether such failure is the result of his or her own acts or the result of acts or conditions beyond his or her control, he or she shall, nevertheless, be personally liable to the state for the amount of the tax.” RCW 82.08.050(3).

All retail sales taxes, even if overpaid, must be remitted to the Department, and can be refunded or credited to the seller only if the seller has first refunded the overpaid tax to its customers. WAC 458-20-229(3)(b); *Kitsap-Mason Dairymen's Ass'n v. Wash. State Tax Comm'n*, 77 Wn.2d 812, 467 P.2d 312 (1970). In *GTE v. Dep't of Revenue*, 49 Wn. App. 532, 535 (1987), GTE had charged, collected, and remitted more retail sales taxes than were due, while underreporting its own B&O taxes. GTE argued it should be able to offset the over-reported retail sales taxes it had collected and remitted against its own under-reported B&O taxes. The Court of Appeals, however, relying on RCW 82.08.050, disagreed, holding that the sales tax overpayment was not GTE’s, but the buyer’s. The court further reasoned that because GTE was a trustee for collection of the tax, it followed that GTE was a trustee of the refund as well. As such, GTE could not use the overpaid trust funds it had charged and collected to reduce the impact of its own tax liability. *See also Kaeser v. Everett*, 47 Wn.2d 666, 289 P.2d 343 (1955); *Urban Constr. Co., Inc. v. Seattle Urban League*, 12 Wn. App. 935, 533 P.2d 392, *review denied*, 85 Wn.2d 1018 (1975); and Excise Tax Advisory 3106.2009 (“Refunds of Over Collected Retail Sales Tax”).

Finally, RCW 82.04.500 provides:

It is not the intention of this chapter that the [B&O] taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons.

The fact that Corporation sent invoices to customers with a separate line item amount labeled “sales tax” is undisputed. Whether correctly collected or collected in error, retail sales taxes are trust funds that never belonged to Corporation. Having charged and collected “sales tax” on its invoices, Corporation would not be entitled to use those amounts to pay its B&O tax liability or other operating expenses. The separately-stated “sales tax” paid by Corporation’s customers was their liability, not Corporation’s. Although Taxpayers complain of Quickbooks software limitations, Corporation was never required to use Quickbooks to create invoices. More importantly, the Washington Supreme Court has held that under RCW 82.04.500, even if disclosed, a seller is prohibited from recouping its B & O taxes by collecting a surcharge from customers in addition to its selling price. *Peck v. AT&T Mobility*, 174 Wn.2d 333, 340, 275 P.3d 304 (2012).

For all of the above reasons, we affirm the amount of the TFAA as issued.

#### DECISION AND DISPOSITION

Taxpayer’s petition is denied.

Dated this 9th day of February, 2016.